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In The

Supreme Court of the United States

October Term, 1994

JACK KEVORKIAN, *Petitioner,*

v.

STATE OF MICHIGAN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

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QUESTIONS PRESENTED

I.

MAY THE GOVERNMENT FORCE A COMPETENT ADULT WHO IS AFFLICTED WITH IRREMEDIABLE, INTOLERABLE PHYSICAL PAIN OR SUFFERING TO CONTINUE TO SUFFER, AGAINST HIS OR HER WILL, UNDER CIRCUMSTANCES WHEREIN ALL REASONABLE ALTERNATIVES ARE EXHAUSTED AND THE ONLY REASONABLY AVAILABLE MEANS OF ENDING THAT SUFFERING INVOLVES THE PERSON'S KNOWING AND VOLUNTARY ENDING OF HIS OR HER OWN LIFE?

II.

DOES A COMPETENT ADULT POSSESS A CONSTITUTIONALLY PROTECTED RIGHT TO ASSISTANCE IN ENDING IRREMEDIABLE, INTOLERABLE PAIN OR SUFFERING UNDER CIRCUMSTANCES WHEREIN THE END OF SUCH PAIN OR SUFFERING INVOLVES THE ENDING OF ONE'S LIFE AND WHEN NO OTHER REASONABLE ALTERNATIVES ARE AVAILABLE?

III.

DOES THE HOLDING OF THE MICHIGAN SUPREME COURT THAT A PERSON WHO ASSISTS IN A SUICIDE MAY BE LIABLE AS A FELON, WHERE THERE IS NO STATUTE PROSCRIBING THE SAME AND WHERE THERE HAS NEVER BEEN ANY DECISIONAL LAW SO HOLDING, CONSTITUTE A DEPRIVATION OF DUE PROCESS OF LAW, DENIAL OF NOTICE AND A PROHIBITION OF THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION OF THE UNITED STATES?

IV.

IS THE STATUTE WHICH THE MICHIGAN SUPREME COURT HELD WAS APPLICABLE TO ASSISTED SUICIDE IN THE ABSENCE OF OTHER STATUTORY AUTHORITY, M.C.L. 750.505; M.S.A. 28.773 UNCONSTITUTIONALLY VAGUE AND OVERBROAD?

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OPINIONS BELOW

The Opinion of the Michigan Supreme Court [App. A] appears at 1994 WL700448 (Mich). The Opinions of the Michigan Court of Appeals appears at 205 Mich.App. 180; 517 N.W.2d 293 (1994) and 205 Mich.App. 194; 518 N.W.2d 487 (1994), sub nom *Hobbins v. Attorney General* [App. B]. The opinions of the respective circuit courts are not published.

JURISDICTION

The Opinion of the Michigan Supreme Court was entered on December 13, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) in that the highest court of Michigan found a state statute valid in the face of a challenge that said statute was repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved here include Article I, § 9, the First, Fifth, Ninth and Fourteenth Amendments and prohibitions against laws which are vague and overbroad.

STATEMENT OF THE CASE

Petitioner, Jack Kevorkian, M.D., is a graduate of the University of Michigan School of Medicine. He has become known, throughout the United States and the rest of the world, as one of the leading exponents on the rights of competent adults to end intolerable and irremediable pain and suffering. Receiving hundreds of requests for assistance every year, Dr. Kevorkian has limited his practice to those who have explored all other reasonable courses and who have not gained relief. In connection with the cases herein, he was consulted by five persons who were in continuous, intractable pain and suffering, to wit: Sherry Miller, Marjorie Wantz, Donald O'Keefe, Merian Frederick and Ali Khalili, M.D.

Sherry Miller was suffering from multiple sclerosis. A bright, vivacious athlete, she was ravaged by the cruelties of her disease and was reduced to wheel-chair confinement, totally dependent upon others for her physical maintenance. She could not perform normal bodily excretory functions without assistance; she was unable to engage in other daily functions of life without assistance. She would surely die a slow, agonizing and humiliating death. She had requested the services of Dr. Kevorkian to end her life for a period of two years prior to October, 1991. He refused to assist for that time but instead counselled her to obtain further medical treat-

ment. During those two years, her physical condition deteriorated progressively and dramatically to the point where she had extraordinary difficulty in speaking and breathing. She suffered considerable pain and discomfort. Her very existence was one of unremitting, excruciating torture and agony.

Marjorie Wantz was suffering from unremitting vulvar pain known as vulvadynia. She had visited clinics throughout the United States and had been the subject of ten (10) separate surgeries designed to alleviate her pain, to no avail. Due to the intensity and insidiousness of the pain which afflicted her, she was unable to sleep for more than two or three hours at a time and invariably cried herself to sleep. She had been given morphine pain patches to the limit beyond which her life would be endangered. These patches did not provide her with pain relief such as to allow her to live a tolerable life. Mrs. Wantz had requested Dr. Kevorkian's assistance for several years prior to October, 1991.

In October, 1991, after Mrs. Wantz and Mrs. Miller provided Dr. Kevorkian with medical records and other documentation attesting to their afflictions, and after it was assured that both Mrs. Wantz and Mrs. Miller had given informed consent and their families consented, Dr. Kevorkian agreed to be present at the termination of their lives. Mrs. Miller activated a carbon monoxide canister and breathed in carbon monoxide, ending her own life. Mrs. Wantz activated a machine designed by Dr. Kevorkian, causing lethal substances to flow into her veins, ending her own life.

Donald O'Keefe was suffering from multiple myeloma, a rare form of bone cancer. He could not swallow food and was nourished through intravenous feeding. He was unable to leave his bed. He was attached to a machine which provided a continuous morphine drip for pain, all

to no avail. His digestive system, including his esophagus, stomach and intestines had begun to rot. He had the pallor of a concentration camp victim. He was in enormous pain and was terminal. He consulted with Dr. Kevorkian in order to end his suffering.

Merian Frederick was suffering from Amyotrophic Lateral Sclerosis ["ALS"], commonly known as Lou Gehrig's Disease, an affliction involving progressive degeneration of the musculature and motor neurons. Victims of this disease usually die within three (3) years of onset and most choke to death in their own sputum. The disease is quite painful and disables the victim. There is no cure or treatment for this disease. Mrs. Frederick consulted with Dr. Kevorkian to terminate the unspeakable suffering to which she was consigned by ending her life in 1993.

Ali Khalili, M.D., was a world-renowned physician specializing in rehabilitative medicine and pain management and who practiced and taught at Northwestern University School of Medicine. He was afflicted with incurable bone cancer. While, undoubtedly, Dr. Khalili could have ended his own life and could have acquired whatever drugs or other substances would be necessary, he chose to seek Dr. Kevorkian's counsel. Dr. Khalili was in enormous pain and suffered greatly before coming to Michigan to see Dr. Kevorkian.

Thus, each of the five patients was suffering from a frightful disease which completely and utterly destroyed his or her ability to lead a normal life, free of constant physical torture and misery. Each one of these patients was actively punished with afflictions so horrendous as to preclude any semblance of the enjoyment of daily life.

These patients sought the assistance of Dr. Kevorkian after having attempted all other reasonable methods of

alleviating the pain and torture of their pathetic existence. In each case, Dr. Kevorkian engaged in counselling and insured that the patient was (a) competent; (b) fully informed as to the ramifications of the termination of life; (c) assured that termination of life was not desired by Dr. Kevorkian and that Dr. Kevorkian did not advocate that the patient engage in suicide; (d) not subject to coercion or duress in making the decision; (e) making the decision of his or her own free will, voluntarily and based upon a full explanation of the situation involved; (f) definite and not tenuous with respect to the decision to end suffering through the termination of life; and (g) given a full opportunity and advised to consult with family members, clergy, and other persons from whom the patient may have wished to seek advice and counsel.

Marjorie Wantz and Sherry Miller ended their own lives on October 23, 1991. Donald O'Keefe ended his life on September 9, 1993. Merian Frederick ended her life on October 22, 1993. Dr. Ali Khalili ended his life on November 22, 1993.

PROCEEDINGS BELOW

Petitioner, Dr. Jack Kevorkian, was charged with criminal conduct in connection with the suicides of the aforementioned five individuals. In Wayne County Circuit Court, he was charged with assisting a suicide in violation of Michigan Compiled Laws ["M.C.L."] 752.1027; Michigan Statutes Annotated ["M.S.A."] 28.547(127) in connection with the death of Donald O'Keefe. In Oakland County Circuit Court, he was charged with open murder under M.C.L. 750.318; M.S.A. 28.550 and also a catch-all felony under M.C.L. 750.505; M.S.A. 28.773 in the suicides of Marjorie Wantz and Sherry Miller; and with

assisting in the suicides of Merian Frederick and Dr. Ali Khalili in violation of M.C.L. 752.1027; M.S.A. 28.547(127). In each case, the persons who committed suicide were stricken with intolerable pain or suffering with no viable hope of recovery. In each case, the charges against Dr. Kevorkian were dismissed.

In the O'Keefe case, the Wayne County Circuit Court, Richard C. Kaufman, J., found that the assisted suicide statute violated the United States Constitution by impermissibly burdening the due process interest in the decision to end one's life. In the Frederick and Khalili cases, the Oakland County Circuit Court, Jessica R. Cooper, J., concluded that a person has the right to commit suicide and found that the assisted suicide statute was unconstitutional under the Michigan Constitution. In the Wantz and Miller cases, the Oakland County Circuit Court, David F. Breck, J., concluded that assisting a suicide was not a crime.

In the O'Keefe case, the Michigan Court of Appeals affirmed the dismissal of the assisted suicide charges on state constitutional grounds, but found that the United States Constitution did not confer a right to commit suicide and that citizens have no right to control their own destinies absent permission by the State. The State appealed, and Dr. Kevorkian cross-appealed.

In the Frederick and Khalili cases, the Michigan Court of Appeals affirmed the dismissal, finding the assisted suicide statute infirm on state constitutional grounds, and the State appealed. In the open murder cases, the Michigan Court of Appeals reinstated the charges and the Petitioner appealed.

The Michigan Supreme Court then heard the appeals in a consolidated appeal with another case, *Hobbins* v. *Attorney General*, not involving Petitioner, and reversed

the decisions of the Michigan Court of Appeals, ruling that the Michigan assisted suicide statute was constitutional under both the Michigan and United States Constitutions. The Michigan Supreme Court also held, in the Wantz and Miller cases, that assisting a suicide might constitute murder under Michigan statutes and ordered an evidentiary hearing to be held in connection therewith. It also held that while those suicides occurred before the enactment of Michigan's assisted suicide statute [the statute became effective February 25, 1993 and expired on November 25, 1994] the Petitioner could properly be charged under M.C.L. 750.505; M.S.A. 28.773, which provides as follows:

> "Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $ 10,000.00, or both at the discretion of the court."

The five cases were remanded back to the trial courts for trial and/or other proceedings.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ANSWER THE CRITICAL QUESTION OF OUR TIME: DOES A COMPETENT ADULT HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO END INTOLERABLE PAIN OR SUFFERING, EVEN THOUGH THE END OF SUCH PAIN OR SUFFERING MAY INVOLVE THE ENDING OF ONE'S LIFE, AND TO OBTAIN ASSISTANCE IN SO DOING?

As advances in science and medicine out-pace the evolution of society, courts are faced with the dilemma

of fixing a balance between individual liberty and the State's exercise of its police powers. In performing this juggling act, courts often have been asked to make decisions that will ultimately result in both the end of suffering for a patient and the concomitant end of life. See *Cruzan* v. *Director, Missouri Dep't. of Health*, 497 U.S. 261; 110 S.Ct. 2841; 111 L.Ed.2d 224 (1990).

Courts have ordered the discontinuance of life-sustaining medical treatment — an order that inevitably leads to the death of the patient. In reaching such difficult decisions, the court must determine the wishes of the suffering patient, who is not always capable of expressing those wishes. The patient-advocate law represents one way in which the Michigan legislature has attempted to address the difficult issues created by modern medical technology. M.C.L. 700.496; M.S.A. 27.5496.

When does the individual's interest in freedom from unjustifiable State interference in personal decision-making outweigh the State's interest in protecting the public health, morals, safety and general welfare? Some would argue that the State has never had the authority to limit or define the liberty interests of the people. Government only has the power which has been delegated by the people and we have never abdicated our right to self-determination. U.S. Const. Amend. IX. Others argue that we only enjoy those freedoms which have been specifically enumerated in the Bill of Rights. Such an argument ignores the very principles upon which the government of this nation was established, would render nugatory the Ninth Amendment to the Constitution of the United States, and would turn on its head the fundamental principle that government is supposed to serve the people, not the other way around.

Following the reasoning of this Court over the past few decades, the State may not intrude into certain personal decisions regarding family, parenthood and bodily integrity. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, ___ U.S. ___; 112 S. Ct. 2791; 120 L.Ed.2d 674 (1992). Such reasoning is based on the premise that government cannot govern that which it lacks the power to govern. Although the State arguably has an interest in protecting life, and thus, preventing irrational suicide, that interest does not encompass an interest in prolonging suffering or inevitable death.

The right of a competent adult to end intolerable pain, suffering, or debilitation is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment and by the Ninth Amendment. The ancient liberty interests in self-realization and self-determination were recognized by the framers of the Constitution. This Court's decisions have not created new rights. This Court's decisions merely have pulled in the reins on a government gone wild; on a government bent on governing where it has no authority to govern; on a government intent upon inculcating personal religious beliefs into the law of the land.

This Court should follow the "essential holdings" of its recent cases that have espoused a right to be free from unwarranted, State-imposed limitations on the exercise of personal liberty, and find that the State of Michigan cannot unreasonably infringe upon a competent adult's decision to end interminable personal physical suffering through the ending of life.

Indeed, the State arguably has a legitimate interest in protecting life under certain circumstances. For example, the State health code, homicide laws, and regulation of the medical professions are designed to pro-

tect life. Does the State's interest in protecting life, though, extend so far as to include an interest in prolonging suffering? Does the State have a legitimate interest in forcing its citizens to endure agonizing pain, suffering and debilitation in the name of protecting life?

In No. 84 of *The Federalist*, Alexander Hamilton assured the people that the authority vested in the new government did not create a sovereign to which the people would become subservient, with the abdication of all rights save for those specifically reserved by a Bill of Rights. Hamilton and the other founders of this nation subscribed to the philosophy that men and women, in their natural state, were free beings. The framers subscribed to the notion of the inalienable rights of self-realization and self-determination. The Bill of Rights is not a license, it is not an expression of privilege. The Bill of Rights and subsequent amendments to the Constitution are an expression of a check on the power of government.

The State has advanced the argument that only those rights specifically enumerated in the constitution are afforded constitutional protection. Hamilton recognized the danger of this argument when he wrote concerning the freedom of the press:

> "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, **to men disposed to usurp, a plausible pretense for claiming that power**. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given,

> and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was vested in the national government." [Emphasis supplied.]

The Federalist, No. 84.

Over the past few decades, this Court and the other courts of this nation have addressed issues of personal autonomy under the precepts of the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. The right to self-determination has been said to be found within the zone of privacy inherent in the First and Ninth Amendments, and within the substantive due process and equal protection guarantees of the Fifth and Fourteenth Amendments.

The First Amendment has a penumbra wherein privacy is protected from governmental intrusion. *Griswold* v. *Connecticut*, 381 U.S. 479, 483; 85 S. Ct. 1678; 14 L.Ed.2d 510 (1965). This zone of privacy emanates from the specific guarantees of the Bill of Rights. *Poe* v. *Ullman*, 367 U.S. 497; 516-522; 81 S. Ct. 1752; 6 L.Ed.2d 989 (1961). The courts have addressed many controversies over the penumbral rights of "privacy and repose." *Griswold*, *supra* at 485. Ultimately, the right to be free from governmental intrusion upon one's own body is secured by the privacy right which emanates from the liberty provisions of the First, Fifth, Ninth and Fourteenth Amendments.

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Thus, in plain English, the Founding Fathers consigned to the rubble heap the notion that a right must be specifically enumerated in the Constitution in order for the people to possess it. The right to end suf-

fering need not be specifically guaranteed by the Constitution, for it may be found within the penumbra of privacy recognized and protected by the Ninth Amendment.

This Court has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. *Griswold*, *supra* at 486, n 1. The Fourteenth Amendment declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The Due Process Clause has been understood for well-over a century to contain a substantive component as well as a procedural one. The Due Process Clause also bars "certain government action regardless of the fairness of the procedures used to implement them." *Daniels* v. *Williams*, 474 U.S. 327, 331; 106 S. Ct. 662; 88 L.Ed.2d 662 (1986).

All fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. *Whitney* v. *California*, 274 U.S. 357, 373; 47 S. Ct. 641; 71 L.Ed. 1095 (1927). "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, *supra*, 112 S. Ct. at 2805. As was recognized by Justice Harlan over thirty years ago:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a **rational continuum** which, broadly

> speaking. includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a **reasonable and sensitive judgment** must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." (Emphasis supplied.)

Poe, supra, 367 U.S. at 543 [Harlan, J., dissenting.]

Dr. Kevorkian asserts that, absent a compelling state interest, government is without power to abridge an individual's right to self-determination. The individual's liberty interest in self-determination cannot be made subject to the whims of "men disposed to usurp" the power retained by the people. The State would urge this court to legitimize the usurpation of power by men claiming that only God can determine the time of death (except, of course, in death penalty cases in states permitting the same), that the people never have possessed the right to self-determination and that those professing such a right are guilty of blasphemy.

"It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, . . . **as well as bodily integrity**." [Emphasis supplied.] *Casey, supra*, 112 S.Ct. at 2806.

In dealing with the issues of the cessation of life-sustaining medical treatment, this Court has addressed whether a state may require proof, by clear and convincing evidence, of an individual's wishes regarding the withdrawal of such treatment. *Cruzan, supra*. In addressing the question, this Court acknowledged that "[a] competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment." *Id.* at 2843.

A competent individual has a liberty interest in refusing unwanted medical treatment, including treat-

ment that often means the difference between life and death. A person can discontinue life-sustaining treatment, an act that inevitably ends in death. In order to discontinue the treatment, a doctor or other health care professional must disconnect the apparatus that is supplying the treatment. The act of disconnecting the life-sustaining treatment is no different from the act of connecting a life-ending apparatus. To attempt to distinguish between withdrawing life-support thereby suffocating or starving an unconscious patient to death, and not providing similar means to a conscious suffering patient, is absurd. See *Cruzan*, *supra*, 497 U.S. at 292-301; 110 S. Ct. at 2859-2863 [Scalia, J., concurring.] In fact, for thirteen years, Michigan Right-to-Life held up passage of the Patient Advocacy/Living Will bill in Michigan by falsely claiming that withdrawing life-support was murder. If abortion is a fundamental right (and it arguably involves a third party), *Casey*, *supra*; if withdrawing life support to surely cause death is a fundamental right, *Cruzan*, *supra*; then controlling one's own life certainly must be fundamental. To find otherwise would be irreconcilable with this Court's decisions in *Casey* and *Cruzan*.

If an individual may designate a third party to order discontinuation of life-sustaining treatment when the individual is no longer capable of expressing the desire to refuse treatment, why cannot a competent person request assistance in ending the suffering and pain of his or her affliction? Why does the State's interest in protecting life extend to one act and not to the other?

The constitutional issues raised in this Petition have been addressed by the United States District Court for the Western District of Washington. *Compassion in Dying* v. *Washington*, 850 F.Supp. 1454 (W.D. Wash., 1994). The federal district court, following the reasoning

espoused by this court in *Casey*, found that the right to end one's suffering during a terminal illness is embodied in the liberty interests protected by the Fourteenth Amendment.

The United States District Court for the Western District of Washington, in early May, 1994, ruled unconstitutional a state statute imposing criminal sanctions for physician-assisted suicide. 850 F.Supp. at 1467. The plaintiffs in that case asserted that the Fourteenth Amendment to the United States Constitution guarantees adults who are mentally competent, terminally ill, and acting under no undue influence, the right to voluntarily hasten their death by taking a lethal dose of physician-prescribed drugs. 850 F.Supp. at 1456.

Neither Michigan nor Washington has a law prohibiting suicide or attempted suicide. Nonetheless, both states banned aiding or causing the suicide of another. Revised Code of Washington, 9A.060(1); M.C.L. 752.1027; M.S.A. 28.547(127). The Washington plaintiffs challenged the constitutionality of the statute in that it placed an undue burden on their right to commit suicide, and on equal protection grounds.

The Federal District Court, following a long line of United States Supreme Court cases, recognized that certain personal decisions are constitutionally protected. 850 F.Supp. at 1459. Finding the reasoning in *Casey* highly instructive and almost prescriptive, the Court concluded that the decision of a terminally ill person to end his or her life "involv[es] the most intimate and personal choices a person may make in a lifetime" and constitutes a "choice[] central to personal dignity and autonomy." The District Court quoted the decision of this Court in *Casey*:

> "These matters, involving the most intimate and personal choices a person may make in a life-

> time, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. **At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.**" [Emphasis supplied.]

850 F.Supp. at 1459, quoting *Casey*, *supra*, 112 S. Ct. at 2807.

The District Court also followed *Casey's* acknowledgement of the deep, heart-felt differences of opinion about the morality of abortion, and its recognition that the court's duty is not to impose a particular moral standard:

> "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter . . . ."

850 F.Supp. at 1460

The District Court held that "the suffering of a terminally ill person cannot be deemed any less intimate or personal, or any less deserving of protection from unwarranted governmental interference, than that of a pregnant woman. Thus, consistent with the reasoning in *Casey*, such an intimate personal decision falls within the realm of the liberties constitutionally protected under the Fourteenth Amendment." 850 F.Supp. at 1460.

In addressing the defendants' arguments that *Casey* is inapposite because of the significant differences between reproductive rights and assisted suicide, the District Court stated that the abortion situation raises *more* difficult questions about competing interests. In reproductive rights cases, there is not only the interest of the pregnant woman seeking an abortion, but also the potential life interest which cannot speak for itself.

As Dr. Kevorkian argued below, only one life is involved in the case of an assisted suicide involving a competent person, and that individual can voice his or her wishes. The District Court was not persuaded by the defendants' absurd arguments regarding the differences between abortion and suicide. The Court was not persuaded by the defendants' "undue influence" argument either, and noted the many situations in which a pregnant girl or woman would be subjected to intense pressure to get an abortion. 850 F.Supp. at 1461.

The District Court also found this Court's decision in *Cruzan* to be instructive. In *Cruzan*, this Court had to decide whether a competent person has a constitutionally protected liberty interest in refusing unwanted, life-sustaining medical treatment including artificially delivered nourishment essential to life. In the majority opinion written by Chief Justice Rehnquist, this Court acknowledged that the logic of its prior decisions embraced just such a liberty interest. This Court held that the United States Constitution grants a competent person the right to refuse life-sustaining medical treatment. *Cruzan*, *supra* at 497 U.S. at 278-279.

The District Court phrased the question, the same question that faces this court, as follows: "[I]s there a difference for purposes of finding a Fourteenth Amendment liberty interest between refusal of unwanted treatment which will result in death and committing

physician-assisted suicide in the final stage of life?" 850 F.Supp. at 1461. The Court held that there is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death. From a constitutional perspective, the District Court did not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult.

The District Court's decision is currently on appeal to the United States Court of Appeals for the Ninth Circuit.

In Oregon, on November 8, 1994, the citizens of that State, recognizing the need for compassion and flexibility in situations involving terminal illnesses, approved a provision which specifically permitted medical assistance in ending life under specified guidelines. The effective date of that law has been stayed pending litigation which may eventually find its way to this Court.

Thousands of individuals in this country are suffering unspeakable physical torture and torment as a result of disease. Not all of them have the ability to obtain relief from that torture and torment. Some diseases are not susceptible to relief, given the present state of medical science. Not all of the persons consigned to such torture and torment wish to suffer the totality of the slings and arrows of misfortune which the diseases will visit upon them. Not everyone so afflicted voluntarily chooses to experience the worst of the cruelties by which the diseases ravage their physical beings.

In certain cases, the only realistic means of alleviating the pain and suffering is termination of life. If the choice is between ending the pain and suffering through

termination of life on the one hand, and continuing horrendous suffering on the other, some competent adults will choose to continue the suffering; other competent adults freely, knowingly and voluntarily will choose not to suffer. Not everyone so afflicted has the ability to end the suffering by themselves. The question is whether government should or may impose itself on these people to force them to suffer against their will.

II.

THE DECISION OF THE MICHIGAN SUPREME COURT IS ERRONEOUS.

The Michigan Supreme Court simply failed to take into account the essential federal constitutional liberty interest which is central to the individual's self-determination of the amount of pain and suffering which he or she is willing to endure. The Michigan Supreme Court looked at the issue from the point of whether one has the right to commit suicide without focusing on the core factor herein.

It is not the ending of life, but rather the ending of suffering, which is the genuine issue. Persons who are afflicted with intolerable suffering wish only to end the suffering. It is not termination of life for the sake of death which is sought; rather, it is the termination of suffering, if need be through the termination of life, which is the real point. It is this which the Michigan Supreme Court failed to recognize.

As a result, the Michigan Supreme Court failed to address the critical issue as to what right government has to force competent, adult individuals to suffer against their will. By misconstruing the issue as one involving the right to suicide as opposed to the right to be free from state-compelled suffering, the Michigan Supreme Court failed to recognize how this Court's deci-

sion in *Casey* set forth principles which are fundamental to the decision of this issue.

Clearly, the Michigan Supreme Court erred precisely because it was unable to see past the rhetoric of the State to discern the genuine matter before it, to wit: the liberty right of every competent, adult individual to make fundamental determinations about his or her own bodily tolerance of physical suffering and misery.

III.

THE PROSECUTION TO WHICH THE MICHIGAN SUPREME COURT SUBJECTS THE PETITIONER VIOLATES THE *EX POST FACTO* AND DUE PROCESS PROVISIONS OF THE UNITED STATES CONSTITUTION.

Petitioner contends that by holding that M.C.L. 750.505; M.S.A. 28.773 subjects Petitioner to felony prosecution even though no statute in Michigan holds that assisting suicide is a crime and even though the decisional law of Michigan prior to this case did not hold that M.C.L. 750.505; M.S.A. 28.773 applied to assisting a suicide, Petitioner was denied due process of law and was subject to *ex post facto* treatment.

In Michigan, assisting a suicide was never a crime until February 25, 1993. See *People* v. *Campbell*, 124 Mich.App. 333, 335 N.W.2d 27 (1983). No statute ever defined assisting a suicide as a crime and no court decision ever did so until the decision of the Michigan Supreme Court on December 13, 1994. [*People* v. *Roberts*, 211 Mich. 187; 178 N.W. 690 (1920) did not view assisted suicide as such; rather, it was concluded that one who provided poison to another to commit suicide was guilty of murder.] Thus, the Michigan Supreme Court's decision claims that Petitioner engaged in criminal activity in October, 1991, despite the fact that, at

the time, there was no statutory provision prohibiting assisting a suicide and no decision had ever construed M.C.L. 750.505; M.S.A. 28.773 to prohibit assisting a suicide. Clearly, the Michigan Supreme Court, in engaging in judicial legislation by judicially creating an offense and then ruling that M.C.L. 750.505; M.S.A. 28.773 makes it a felony to commit the newly minted judicial offense. Thus, the Michigan Supreme Court subjected Petitioner to *ex post facto* treatment by criminalizing an act which was not criminal at the time it was performed. Even the Michigan Supreme Court, itself, recognized the repugnant character of its decision by specifically denying, in its opinion, that it was engaging in *ex post facto* action.

Additionally, M.C.L. 750.505; M.S.A. 28.773 is so vague and overbroad, that it is impossible for a citizen to be able to determine whether he or she is in violation of the statute. What acts were indictable at common law and at what point in history? Was performing an abortion within the first trimester indictable at common law? Was a Gypsy's remaining in England for more than thirty (30) days at a time indictable at common law? How is someone to know whether any act is permissible or prohibited if we are at the whim of state judges who may create common law offenses out of whole cloth?

Clearly, the Michigan Supreme Court's foray into judicial legislation as well as its embracing of M.C.L. 750.505; M.S.A.28.773 are constitutionally repugnant.

IV.

THE QUESTION HEREIN IS IMPORTANT.

The question involved herein is an important one, not only to the Petitioner, but to the country as a whole. With insidious diseases such as AIDS, cancer and ALS wreaking havoc on thousands of our citizens, and with

persons living longer and becoming subject to diseases which were known primarily in textbooks, if at all, the citizens of this nation are faced with increasingly serious questions regarding their own destinies.

There are those who may wish to live to the last breath, irrespective of the agony and torture which the cruelties of disease may consign them to suffer. Yet, there are others who may wish not to be victimized in all the horrible manner which some of the most notorious diseases visit upon their casualties. Should an adult, competent individual be forced by the State to endure the torture and suffering of unspeakable diseases against his or her will? May government, under the rubric of "protecting life", subject an unwilling participant to that type of torture which this Court would prohibit being inflicted upon a convicted murderer as being cruel and unusual punishment in violation of the Eighth Amendment?

The position of the State herein is a radical extremist position — an absolute prohibition on a competent adult's ability to obtain assistance of any kind, under any circumstances, for any reason, to end ongoing, insidious and intolerable physical suffering in the face of excruciating disease if the assistance is designed to help that person end his or her own life.

As this nation embarks upon the 21st Century, these questions need to be answered by the highest Court of this land so that the law may be applied fairly and uniformly and so that the victims of catastrophic and tortuous physical infirmity may know that they need not be victimized twice — once by disease and a second time by their own government.

CONCLUSION

It is respectfully requested that this Honorable Court grant this Petition for Certiorari and set this case for full briefing, oral argument and decision.

Respectfully submitted,

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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

JACK KEVORKIAN, *Petitioner,*

v.

STATE OF MICHIGAN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

VOLUME I

Appendix A: Michigan Supreme Court Opinion

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VOLUME I

APPENDIX A

OPINION

(State of Michigan — Supreme Court)

(Argued October 4, 1994 (Calendar No. 1))
(Decided December 13, 1994)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, Cross-Appellee, v JACK KEVORKIAN, Defendant-Appellee, Cross-Appellant — No. 99591; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JACK KEVORKIAN, Defendant-Appellant — No. 99674; TERESA HOBBINS, MARIE DEFORD, KENNETH A. SHAPIRO, KENNETH WEINBERGER, WILLIAM DRAKE, ELLIOT D. LUBY, NORMAN BOLTON, KENNETH TUCKER, KATHRYN UPTON, and B. ELLIOT GRYSON, Plaintiffs-Appellees, v ATTORNEY GENERAL OF MICHIGAN, Defendant-Appellant — No. 99752; TERESA HOBBINS, MARIE DEFORD, KENNETH A. SHAPIRO,

KENNETH WEINBERGER, WILLIAM DRAKE, ELLIOT D. LUBY, NORMAN BOLTON, KENNETH TUCKER, KATHRYN UPTON, and B. ELLIOT GRYSON, Plaintiffs-Appellants, v ATTORNEY GENERAL OF MICHIGAN, Defendant-Appellee — No. 99758; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, Defendant-Appellee — No. 99759)

Michael F. Cavanagh, Chief Justice; Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices.

SYLLABUS

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This syllabus was prepared by the Reporter of Decisions, William F. Haggerty

Jack Kevorkian, M.D., was charged in separate cases in the Wayne and Oakland Circuit Courts with assisting in the suicides of three people, MCL 752.1027; MSA 28.547(127), and also was charged in the Oakland Circuit Court with open murder arising out of assisting the suicides of two other people before the enactment of the assisted suicide statute. In each case, the charges were dismissed.

The Wayne Circuit Court, Richard C. Kaufman, J., found that the assisted suicide statute impermissibly burdened the due process interest in the decision to end one's life. The Oakland Circuit Court, Jessica R. Cooper, J., concluded that, while a person has the right to commit suicide, an assistor, such as the defendant, lacks standing to challenge the statute, but found the statute to be unconstitutional as violative of the Title-Object Clause of the Michigan Constitution and because its purpose was changed during passage. In the case involving the open murder charges, the court, David F. Breck, J., concluded that assisting a suicide was not murder.

In the Wayne County case, the Court of Appeals, Fitzgerald, P.J. (D. E. Shelton, and Taylor, J.J., concurring in part and dissenting in part), affirmed the dismissal of the assisting charges, but reversed with respect to the constitutionality of the right to commit suicide and of the statute (Docket No. 171056). The people appeal, and the defendant cross appeals.

In the Oakland County cases, the Court of Appeals, Fitzgerald, P.J. (D. E. Shelton, and Taylor, J.J., concurring in part and dissenting in part), affirmed

the decision regarding the assisted suicide statute (Docket No. 172399), and the people appeal. In the open murder case, the Court of Appeals, Fitzgerald, P.J., and Taylor, J. (D. E. Shelton, J., dissenting), reversed, reinstating the charges (Docket No. 154740), and the defendant appeals.

Teresa Hobbins and others sought a declaration in the Wayne Circuit Court that the assisted suicide statute was unconstitutional. The court, Cynthia D. Stephens, J., concluded that the statute violated Const 1963, art 4, §24, because it did not have a single object and there was a change in the purpose of the bill during its passage. The court further found a due process fight to commit suicide. The Court of Appeals, Fitzgerald, P.J. (D. E. Shelton, and Taylor, JJ., concurring in part and dissenting in part), affirmed the decision that the statute was unconstitutional, but reversed with respect to the decision that the constitution protects the fight to commit suicide, concluding that the state is free to criminalize assisting a suicide (Docket No. 164963). The parties appeal.

In a memorandum opinion, the Supreme Court *held:*

The assisted suicide provisions of MCL 752.1027; MSA 28.547(127) were validly enacted and do not violate the Title-Object Clause of the Michigan Constitution. The United States Constitution does not prohibit a state from imposing criminal penalties for assisting a suicide. In the murder case, the common-law definition of murder does not encompass the act of intentionally providing the means by which a person commits suicide. Only where there is probable cause to believe that death was the direct and natural result of a defendant's act can the defendant be properly bound over on a charge of murder. Where a defendant merely is involved in the events leading up to the death, such as providing the means, the proper charge is assisting in a suicide, which may be prosecuted as a common-law felony under the saving clause, MCL 750.505; MSA 28.773, in the absence of a statute that specifically prohibits assisting in a suicide. The motion to quash must be reconsidered by the circuit court to determine if the evidence produced at the preliminary examination was sufficient to bind the defendant over for trial.

Chief Justice Cavanagh and Justices Brickley and Griffin stated:

Const 1963, art 4, §24 provides that no law may embrace more than one object, nor may a bill be altered or amended on its passage through either house so as to change its original purpose as determined by its total content. The object of the legislation is to be determined by examining the law as enacted, not as originally introduced. The assisted suicide statute clearly embraces only one object, and was validly enacted. In addition, the purpose of the statute was not changed during its passage. The test for determining if an amendment or substitute changes a purpose of the bill is whether the

subject matter is germane to the original purpose. The creation of the Michigan Commission on Death and Dying and the provision of criminal penalties were appropriately placed in the same bill. Any problems with 1992 PA 270, which originally prohibited assisting a suicide, were eliminated by the enactment of 1993 PA 3, which replaced the former provisions and remedied any constitutional defect in the original act. Thus, the assisted suicide statute is not void as violative of Const 1963, art 4, §24.

The Due Process Clause of the United States Constitution does not encompass a fundamental fight to commit suicide, with or without assistance, regardless of whether the assistant is a physician. The right cannot be inferred from federal case law recognizing a protected liberty interest in the withdrawal of lifesustaining medical treatment. Suicide involves an affirmative act to end life, whereas refusal or cessation of life-sustaining medical treatment permits life to run its course, unencumbered by contrived intervention. The right to commit suicide is neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and tradition. Rather, it would be an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition, to declare that there is such a fundamental right protected by the Due Process Clause.

It is incorrect to conclude on the basis of an absence of criminal penalties for an act of suicide itself and the existence of a pragmatic capacity to commit suicide that there is a constitutional right to commit suicide. Such a right is not expressly recognized in the United States Constitution or the decisions of the United States Supreme Court, and cannot reasonably be inferred. Rather, the Court repeatedly and unequivocally has affirmed the sanctity of human life and rejected the notion that there is a right of self-destruction inherent in any common-law doctrine or constitutional phrase.

The Supreme Court has the authority and the duty to change the common law where required. While the crime of murder has been classified and categorized by statute, its definition has been left to the common law. Although early decisions held that a murder conviction may be based on merely providing the means by which another commits suicide, few jurisdictions retain that view, and a majority treats assisted suicide as a separate crime, with penalties less onerous than those for murder. Distinctions have been drawn between active participation in a suicide and involvement in the events leading up to the suicide, such as providing the means. In the years since *People* v *Roberts*, 211 Mich 187 (1920), was decided, interpretation of causation in criminal cases has evolved to require a closer nexus between an act and a death. Only where there is probable cause to believe that the death was the direct and natural result of the defendant's act can a defendant properly be bound over on a charge of murder. Where the defendant is involved

merely in the events leading up to the commission of the final overt act, such as furnishing the means, a conviction of assisted suicide is proper. Thus, to the extent that *Roberts* can be read as support for the view that common-law murder encompasses the act of intentionally providing the means by which a person commits suicide, it should be abrogated.

Even absent a statute specifically proscribing assisted suicide, prosecution and punishment for assisting in a suicide would not be precluded, and may be had as a separate common-law offense under the saving clause of MCL 750.505; MSA 28.773. This reinterpretation of the common law does not enlarge the scope of criminal liability for assisted suicide, but rather reduces liability where a defendant merely is involved in the events leading up to the suicide, such as providing the means.

Because in the Oakland County murder case neither the circuit court nor the Court of Appeals had the benefit of this analysis for evaluating the degree of participation by the defendant, it should be remanded to the circuit court for reconsideration of the defendant's motion to quash.

Justice Boyle, joined by Justice Riley, concurring in part and dissenting in part, stated that the majority erroneously defines criminal homicide in the suicide context to absolve those who participate in the suicide of culpability for murder, unless they participate in the final act precipitating death. A person who participates in the death of another may be charged with murder, irrespective of the consent of the deceased.

The Supreme Court may not create a new crime of assisted suicide under the authority of the saving clause of MCL 750.505; MSA 28.773. The clause recognizes common-law crimes not proscribed by statute. The Supreme Court cannot simply exclude from the definition of common-law murder murder as defined by statute and then use the saving clause to authorize what was common-law murder as the new crime of assisted suicide.

In these cases, the acts shown establish causation as a matter of law for purposes of bindover. Thus, the trial courts erred in quashing the informations.

Justice Levin, joined by Justice Mallett, concurring in part and dissenting in part, stated that 1993 PA 3, §7 violates the Due Process Clause insofar as it bars a competent, terminally ill person facing imminent, agonizing death from obtaining medical assistance to commit suicide. In the Oakland County murder case, the defendant's actions were not murder. The evidence establishes no more than criminal assistance of suicide or a common-law assisted suicide offense for which no provision is made by statute.

A competent person who is terminally ill may have a liberty interest in obtaining a physician's assistance to commit suicide. As applied to a particular terminally ill person, MCL 752.1028; MSA 28.547(127) may be violative of the Due Process Clause of the Fourteenth Amendment. Thus, a terminally ill person should be permitted to apply to the circuit court for an order declaring determination of entitlement to seek medical assistance to commit suicide and whether the statute is violative of the Due Process Clause as applied to that person.

The real issue is not whether the state can generally prohibit suicide; it is whether the state may deny a competent, terminally ill person, facing imminent, agonizing death, medical assistance to commit suicide.

Assisted suicide can be distinguished from other conduct protected by the Due Process Clause, such as abortion and the withdrawal of life-sustaining medical treatment. State law restrictions on a person's ability to end life implicate the interest in personal liberty. Whether a competent, terminally ill person has a right to medical assistance to commit suicide cannot be decided without balancing the state's interest against the person's interest.

In the suicide context, legitimate state interests generally outweigh the interest in ending one's life. The vast majority of suicides are irrational efforts by the depressed or mentally disturbed. Society can reasonably assume that such mental problems have clouded the person's perception. Where an otherwise healthy person is depressed or mentally disturbed, the personal liberty interest is weak, and the state has a strong interest in protecting that person's interests in life. In contrast, where the person involved is competent, terminally ill, and facing imminent, agonizing death, the interest of the state in preserving life is weak, and the interest of the terminally ill person in ending suffering is strong.

The state asserts two interests. First, the state's general interest in preserving life. In most situations where a person might seek to commit suicide, the person, even if handicapped or emotionally disturbed, has years of life remaining for the state to protect. That possibility has been largely foreclosed for a terminally ill person. The choice that remains is not between life and death, but over the terms of death. The principal argument against assisted suicide is the second interest asserted by the state: assuring that persons who desire to live are not coerced into committing suicide. While this is clearly a concern of great importance, adequate procedures can and have been developed to assure that a terminally ill person's choice to end life is not coerced.

Justice Mallett, joined by Justice Levin, concurring in part and dissenting in part, stated that a terminally ill person has a right to choose to hasten an

inevitable death only where that person has made a competent decision and is suffering from great pain. The state may require proof of such a decision by clear and convincing evidence. Because the assisted suicide statute completely prohibits physician-assisted suicide, it is facially invalid.

The liberty to end one's suffering during a terminal illness exists without the approval of a significant constituency and is no less deserving of recognition than abortion. Historical analysis of fundamental rights is inappropriate. Earlier laws or traditions are not the sources of liberty or privacy interests; constitutional provisions are limitations on the power of the sovereign to infringe the liberty of citizens. Case law has recognized that a competent person has a fundamental right to refuse unwanted medical treatment, to determine whether to continue suffering when faced with inevitable death, and that the state may not compel unwanted lifesaving treatment. To recognize a right to physician-assisted suicide is simply a logical extension of the law.

Some decisions remain so personal that society is in no position to judge their appropriateness. A person's conscience, coupled with the advice of an informed and personally chosen physician, is the appropriate decision-making method. A complete ban on physician-assisted suicide is an undue burden on the right of a terminally ill person to end suffering through physician-prescribed medication. The fight of a person to hasten an inevitable death is not absolute, however. Only where the person has made a competent decision and is suffering from great pain should the right be recognized. Otherwise, the state may assert its interest in preserving life as well as other established interests.

Docket No. 99591, reversed and remanded; Docket No. 99759, reversed and remanded; Docket Nos. 99752, 99758, affirmed in part and reversed in part; Docket No. 99674, vacated and remanded; 205 Mich App 180; 517 NW2d 293 (1994) vacated; 205 Mich App 194; 518 NW2d 487 (1994) affirmed in part and reversed in part; *People* v *Roberts*, 211 Mich 187 (1920) overruled.

MEMORANDUM OPINION

These cases raise three issues with regard to the state's imposition of criminal responsibility on persons who assist others in committing suicide. Two questions are presented by the appeals in Docket Nos. 99591,

99752, 99758, and 99759: (1) whether the Michigan assisted suicide statute, MCL 752.1027; MSA 28,547(127), was enacted in violation of Const 1963, art 4, § 24; (2) whether the criminal provisions of MCL 752.1027; MSA 28,547(127) violate the United States Constitution. In Docket No. 99674, a case predating the assisted suicide statute, the question presented is: (3) whether the circuit court erred in quashing the information charging the defendant with murder.

A majority of the Justices is of the opinion that:

1) The assisted suicide provisions of the statute were validly enacted and do not violate the Title-Object Clause of the Michigan Constitution. (Cavanagh, C.J., and Levin, Brickley, Boyle, Riley, Griffin, and Mallett, JJ.)

2) The United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in committing suicide. (Cavanagh, C.J., and Brickley, Boyle, Riley, and Griffin, JJ.)

3) In the murder case, *People* v *Roberts*, 211 Mich 187, 178 NW 690 (1920), is overruled to the extent that it can be read to support the view that the common-law definition of murder encompasses the act of intentionally providing the means by which a person commits suicide. Only where there is probable cause to believe that death was the direct and natural result of a defendant's act can the defendant be properly bound over on a charge of murder. Where a defendant merely is involved in the events leading up to the death, such as providing the means, the proper charge is assisting in a suicide, which may be prosecuted as a common-law felony under the saving clause, MCL 750.505; MSA 28.773, in the absence of a statute that specifically prohibits assisting in a suicide. (Cavanagh, C.J., and Levin, Brickley, Griffin, and Mallett, JJ.)

4) The motion to quash must be reconsidered by the circuit court to determine whether the evidence produced at the preliminary examination was sufficient to bind the defendant over for trial. (Cavanagh, C.J., and Brickley, Griffin, and Mallett, JJ.)

We reverse the Judgment of the Court of Appeals in *People* v *Kevorkian*, Docket No. 99591, and *People* v *Kevorkian*, Docket No. 99759, and remand the cases to the respective circuit courts for further proceedings. In *Hobbins* v *Attorney General*, Docket Nos. 99752 and 99758, we reverse the Judgment of the Court of Appeals with regard to the claimed violation of Const 1963, art 4, § 24, and affirm in all other respects. Finally, in *People* v *Kevorkian*, Docket No. 99674, we vacate the Judgment of the Court of Appeals, and remand the case to the circuit court for further proceedings.

This memorandum opinion is signed by the seven justices. There are separate concurring and dissenting opinions. However, at least four Justices concur in every holding, statement, and disposition of this memorandum opinion.

/s/ Michael F. Cavanagh
/s/ Dorothy Comstock Riley
/s/ James H. Brickley
/s/ Conrad L. Mallett, Jr.
/s/ Patricia J. Boyle
/s/ Robert P. Griffin
/s/ Charles C. Levin

LEAD OPINION

CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.

These cases raise three issues with regard to the state's imposition of criminal responsibility on persons who assist others in committing suicide. Two questions are presented by the appeals in Docket Nos. 99591, 99752, 99758, and 99759: (1) Whether the Michigan

assisted suicide statute, MCL 752.1027; MSA 28.547(127), was enacted in violation of Const 1963, art 4, § 24. (2) Whether the criminal provisions of MCL 752.1027; MSA 28.547(127) violate the United States Constitution. In Docket No. 99674, a case predating the assisted suicide statute, the question presented is: (3) Whether the circuit court erred in quashing the information charging the defendant with murder.

We conclude: (1) the assisted suicide provisions of the statute were validly enacted and do not violate the Title-Object Clause of the Michigan Constitution, (2) the United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in committing suicide, (3) in the murder case, the motion to quash must be reconsidered by the circuit court to determine if the evidence produced at the preliminary examination was sufficient to bind the defendant over for trial.

I

Hobbins v *Attorney General*
(Docket Nos. 99752, 99758)
The "Declaratory Judgment Action"

Shortly after the Legislature enacted the assisted suicide statute, a group of plaintiffs, two of whom are alleged to be suffering from terminal cancer, a friend of one of them, and seven medical care professionals, brought en action in Wayne Circuit Court, seeking a declaration that the statute was unconstitutional. The parties moved for summary judgment and the plaintiffs sought a preliminary injunction against enforcement of the statute. The circuit court found the statute to be unconstitutional.[1] First, it concluded that there were

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[Printer's Note]: **Footnotes 1-74 are reproduced, *infra*, beginning on page A-46.**

two violations of Const 1963, art 4, § 24: the statute did not have a single object, and there was a change in the purpose of the bill during its passage through the Legislature. Second, the court found a due process right to commit suicide. However, it declined to issue a preliminary injunction, concluding that hearings would be needed to determine whether the statute placed an undue burden on that right. The Attorney General filed a claim of appeal in the Court of Appeals.

People v *Kevorkian*
(Docket No. 99591)
The "Wayne County Assisted Suicide Case"

Also after the enactment of the assisted suicide statute, defendant Kevorkian is alleged to have assisted in the death of Donald O'Keefe. The defendant was charged under the statute and bound over after preliminary examination. He moved to dismiss, and the circuit court granted the motion. The court rejected the art 4, § 24 challenges to the statute, but found a due process interest in the decision to end one's life, and that the law impermissibly burdened that interest.

The court held an evidentiary hearing to determine if the facts satisfied the four-part test that it had set forth in its opinion.[2] Following the hearing, the court issued an order concluding that the facts of the case met the standard and dismissed the charge. The prosecutor appealed to the Court of Appeals.

People v *Kevorkian*
(Docket No. 99759)
The "Oakland County Assisted Suicide Case"

Defendant Kevorkian was charged in two separate files with assisting in the suicides of Merion Frederick and All Khalili. The defendant was bound over after a preliminary examination in one case and waived exami-

nation in the other. The circuit court granted the defendant's motion to dismiss. The court discussed the potential privacy and liberty interests in ending one's life, concluding that a person does have the right to commit suicide. However, it further concluded that defendant Kevorkian lacked standing to challenge the statute.[3] The court also found that the statute was unconstitutional because it had more than one object and because its purpose was changed during its passage through the Legislature. The prosecuting attorney appealed.

People v *Kevorkian*
(Docket No. 99674)
The "Oakland County Murder Case"

Before the statute was enacted, defendant Kevorkian allegedly assisted in the deaths of Sherry Miller and Marjorie Wantz on October 23, 1991. He was indicted by a citizens' grand Jury on two counts of murder.[4] After a preliminary examination, the defendant was bound over for trial.[5] In the circuit court, the defendant moved to dismiss, and the circuit judge granted the motion, concluding that assisting in suicide does not fall within the crime of murder. The prosecutor appealed.

II

The Court of Appeals issued its decisions in two sets of opinions on May 10, 1994. One decision dealt with the cases involving the assisted suicide statute.[6] The majority concluded that the assisted suicide statute was unconstitutional because the act had more than one object, in violation of art 4, § 24. Though recognizing that it arguably was not necessary to deal with the remaining issue, the majority went on to consider whether the statute violated the United States Constitution. The majority concluded that there was no viola-

tion, and that the state was free to make it a criminal offense to assist another in committing suicide.[7]

The appeal regarding the murder case was decided separately.[8] The majority[9] concluded that the circuit court erred in quashing the information.

III

The prosecuting authorities in each of the assisted suicide cases appealed. the conclusion that the assisted suicide statute was enacted in violation of Const 1963, art 4, § 24. Defendant Kevorkian filed a cross appeal with regard to the United States constitutional issue in the Wayne County assisted suicide case, and the plaintiffs in the declaratory judgment action filed their own application for leave to appeal on that issue. In the murder case, defendant Kevorkian filed an application for leave to appeal. On June 6, 1994, we granted the applications, 445 Mich 917, and the cases were argued on October 4, 1994.

IV

A

During 1991, several bills were introduced in the Legislature regarding the subject of assisting in suicide. The bill that ultimately became 1992 PA 270 was introduced on March 7, 1991, as HB 4501. As originally introduced, it would have created the Michigan Commission on Death and Dying that was to study "voluntary self-termination of life" and related subjects and report its recommendations to the Legislature.[10] It was referred to the Judiciary Committee, and there were public hearings in December 1991. The committee reported a substitute bill to the House on November 12, 1992.

On November 24, the House amended the substitute bill by adding a section that would make it a crime to

assist another in committing suicide,[11] and the bill passed the House on that date.[12] The Senate passed the bill on December 3, 1992, and it was signed by the Governor on December 15. 1992 PA 270. It was to be effective March 31, 1993, ninety days after the legislative session, as provided by Const 1963, art 4, § 27.

On January 26, 1993, SB 211 was introduced to amend § 7 of 1992 PA 270, which contained the criminal penalties.[13] It passed the Senate on February 11. On February 25, the House approved a substitute, which, among other things, provided that the act, including both the commission and criminal provisions, would be effective on February 25, 1993. The Senate concurred in the substitute, and the Governor signed the bill that same day. 1993 PA 3.[14]

Each house had voted to give the act immediate effect, and thus the act was effective on February 25, 1993. The enrolled bill[15] sets forth the full text of each section of the act as required by Const 1963, art 4, § 25. Pursuant to the statute, the Commission on Death and Dying was constituted and prepared its final report to the Legislature.

B

Const 1963, art 4, § 24 provides as follows:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.[16]

Three kinds of challenges may be brought against statutes on the basis of Const 1963, art 4, § 24: (1) a "title-body" challenge, (2) a multiple-object challenge,

and (3) a change of purpose challenge. No "title-body" challenge, claiming that the title of the act does not adequately express the content of the law, is before us. However, the other two bases for contesting the statute are presented.

The circuit court in both the declaratory judgment action and the Oakland County assisted suicide case held that the statute had more than one object and that the purpose of HB 4501 was changed during its passage through the Legislature.

The Court of Appeals majority reached only the multipleobject challenge and affirmed the circuit court decisions.[17]

We would hold that both art 4, § 24 challenges of the statute are without merit, and reverse.

1

Multiple-Object Challenge

The purpose of the constitutional provision now found in art 4, § 24 was stated by Justice Cooley fifteen years after such language was included in the Constitution of 1850,

> The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management,

> clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it. [*People ex rel Drake* v *Mahaney*, 13 Mich 481, 494-495 (1865).]

The provision is not meant to be applied restrictively. *Kuhn* v *Treasury Dep't*, 384 Mich 378, 387-388; 183 NW2d 796 (1971). See also *Local No 644* v *Oakwood Hosp Corp*, 367 Mich 79, 91; 116 NW2d 314 (1962):

> Numerous cases have held that the "object" of a statute is the general purpose or aim of the enactment. The legislature may empower a body created by it to do everything requisite, necessary, or expedient to carry out the principal objective to be attained. Legislation, if it has a primary object, is not invalid because it embraces more than 1 means of attaining its primary object. *In re Brewster Street Housing Site*, 291 Mich 313 [289 NW 493 (1939)].

With all but the simplest of statutes, it would be possible to select one section, describe the "object" of that section, and be able to reason, as the Court of Appeals majority did in this case, that the remaining sections have different objects. The flaw in this approach is in

defining the object of 1992 PA 270 as being limited to the content of the bill as originally introduced. The Court of Appeals said:

> The original purpose of HB 4501, as expressed in both the title and body of the bill, was to create a new public act to study certain issues related to death and dying. This bill had no regulatory authority. When HB 4501 was amended to add the substance of SB 32, the additional provisions had another and different objective — to amend the Penal Code to create the crime of criminal assistance to suicide. [205 Mich App 194, 201-202; 518 NW2d 487 (1994).]

In so reasoning, the Court of Appeals majority confused the analysis to be used in multiple-object cases with that appropriate in assessing a challenge based on a change of purpose theory. The object of the legislation must be determined by examining the law as enacted, not as originally introduced.

We would find the instant statute clearly to embrace only one object.[18] While the cases cited by the parties involving multiple-object challenges concern quite different statutes, an examination of those cases that have found multiple-object violations[19] and those that have not[20] demonstrates that the instant case falls squarely within the category of permissible joining of statutory provisions.

The Court of Appeals majority sought to distinguish *People* v *Trupiano*, 97 Mich App 416; 296 NW2d 49 (1980), on which the prosecutors relied, on the ground that the statute in question in that case (the Public Health Code)[21] involved a legislative enactment constituting a "code."[22] However, there is no "code exception" in art 4, § 24. Rather, the cases upholding codes against

multiple-object challenges are at most an extension of the liberality with which such challenges are reviewed.

The Court of Appeals majority suggested that the Legislature could have included the provisions regarding the commission and the criminal penalties in the same bill if it had used a more general title:

> Had the Legislature intended to codify or regulate the general "subject" of assisted suicide, it could have notified the public of this intention by declaring a single broad purpose and by joining the object contained in HB 4501 with the object contained in SB 32 together in one bill. This the Legislature did not do. This failure resulted in the body of the act containing two distinct objects. The fact that the title was amended to reflect the addition of § 7 does not cure the constitutional infirmity. The one-object provision may not be circumvented by creating a title that includes different legislative objects. *Hildebrand* v *Revco Discount Drug Centers*, 137 Mich App 1, 11; 357 NW2d 778 (1984). [205 Mich App 202-203.]

This emphasis on the title is misplaced. It cannot be said that a statute has two objects if its title specifically describes its content, but only one if the title is general. Insofar as one of the purposes of the Title-Object Clause is to provide notice of the content of a bill to the Legislature and the public, a more specific title better achieves that purpose, particularly regarding a fairly short bill like the one in this case. Elsewhere in its opinion, the Court of Appeals majority itself recognized that one looks to the body of the act, not the title, to determine whether it has a single object:

> While the object must be expressed in the title, the body of the law must be examined to determine whether it embraces more than one

> object. *Kent Co ex rel Bd of Supervisors of Kent County* v *Reed*, 243 Mich 120, 122; 219 NW 656 (1928). [205 Mich App 199.]

The *Hobbins* plaintiffs and defendant Kevorkian also argue that there was a multiple-object violation because the provisions could have been enacted in separate bills. They rely on *Advisory Opinion on Constitutionality of 1975 PA 227 (Question One)*, 396 Mich 123, 129; 240 NW2d 193 (1976):

> "The provisions in these two sections might have been enacted in separate laws without either of them in any way referring to or affecting' the other." [Quoting *Kent Co ex rel Bd of Supervisors* v *Reed*, *supra* at 122.]

This principle is unsound. There is virtually no statute that could not be subdivided and enacted as several bills. It is precisely that kind of "multiplying, of legislation that we seek to avoid with the liberal construction given to art 4, § 24.[23]

Accordingly, we would hold that the assisted suicide statute embraces only one object and thus was validly enacted.

2

Change in Purpose Challenge[24]

The *Hobbins* plaintiffs also challenge the statute on the ground that its purpose was changed during its passage through the Legislature. They point to *Anderson* v *Oakland Co Clerk*, 419 Mich 313, 329; 353 NW2d 448 (1984), as establishing that the objectives of that provision are to "preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration . . . ." The provision is integrally related to the "five-day rule" of art 4, § 26, which states that no bill can be passed until it has been printed or repro-

duced and in the possession of each house for at least five days. They maintain that those principles have been violated in this statute. After the bill was introduced, the Legislature amended HB 4501 to add a provision criminalizing assisted suicide. The *Hobbins* plaintiffs say that this amendment dramatically changed the purpose of the original bill, which was to create a study commission. Thus, it is argued, the Legislature was able to enact a lawmaking assisted suicide a criminal offense without giving the people an opportunity to be heard on this highly charged and emotional issue. Looking at the legislative calendar for the day on which the amendment was made, the *Hobbins* plaintiffs find reference only to an act to create the Commission on Death and Dying.

In response to the prosecuting authorities' argument that the later enactment of 1993 PA 3 cured the defect, the plaintiffs maintain that the argument is "structurally unsound" and misstates the effect of the reenactment of an amended law. They contend that the constitutional violation was complete when 1992 PA 270 was enacted, and that 1993 PA 3 merely amended the former act in minor respects and gave it immediate effect.

The argument by the plaintiffs fails to take into account that the criminal penalties for assistance to suicide were an interim measure tied to the Legislature's continuing consideration of issues related to death and dying, including those to be covered in the report of the commission. Thus, the penalties can be viewed as simply providing a stable environment while the Commission on Death and Dying, the Legislature, and the citizenry studied these questions further.

Moreover, cases interpreting the change of purpose clause indicate that the test for determining if an amendment or substitute changes a purpose of the bill

is whether the subject matter of the amendment or substitute is germane to the original purpose.[25] The test of germaneness is much like the standard for determining whether a bill is limited to a single object. As we held above, the creation of the commission and the provision of criminal penalties were appropriately placed in the same bill.

We also agree with the prosecuting authorities that any problems with the enactment of 1992 PA 270 were eliminated with the enactment of 1993 PA 3. The plaintiffs do not claim that the later act is independently subject to attack on a change of purpose ground. It is a basic principle of statutory construction that an amending statute replaces the former provisions. As we explained in *Lahti* v *Fosterling*, 357 Mich 578, 587-588; 99 NW2d 490 (1959):

This Court in *People* v *Lowell*, 250 Mich 349, 354-356 [230 NW 202] (1930), said:

> "An amendatory act has a repealing force, by the mechanics of legislation, different from that of an independent statute. Repugnancy is not the essential element of implied repeal of specifically amended sections. The rule is:
>
> > "'Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there.' 25 RCL [Statutes § 159], p 907 . . . .
>
> "Nevertheless, the old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not from the former. 1 Lewis, Sutherland Statutory Construction (2d ed), § 237.

> "It is plain from the authorities in this State and elsewhere that the effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely and substitute the new section in its place. This effect is not an arbitrary rule adopted by the courts. It is the natural and logical effect of an amendment 'to read as follows.' It accomplishes precisely what the words import. Any other construction would do violence to the plain language of the legislature."

1993 PA 3 amended each section of 1992 PA 270, and the entire text was reprinted and reenacted. The enacting clause stated that those sections were "amended to read as follows . . . ."

Further, it is clear that an amending statute can remedy a constitutional defect in the original act. As noted in 1A Singer, Sutherland Statutory Construction (5th ed), § 22.04, p 182, "[s]ome courts have indicated that an unconstitutional act is legally nonexistent and cannot be given effect by an attempt to amend it." However, as the treatise goes on to explain:

> A majority of courts seem to have rejected the theory that an unconstitutional act has no existence, at least for the purpose of amendment. The unconstitutional act physically exists in the official statutes of the state and is available for reference, and as it is only unenforceable, the purported amendment is given effect . . . .
>
> This escape from the legal fiction that an unconstitutional act does not exist is sound. That fiction serves only as a convenient method of stating that an unconstitutional act gives no rights or imposes no duties . . . . Amendment

> offers a convenient method of curing a defect in an unconstitutional act. [*Id.* at 183.]

This principle has been followed in Michigan cases,[26] and is fully applicable here. The statute under which defendant Kevorkian has been charged is MCL 752.1027; MSA 28.547(127), as amended by 1993 PA 3, which was not enacted in violation of the change of purpose clause.

Accordingly, we would hold that the assisted suicide provisions of MCL 752.1027, MSA 28.547(127) are not void by reason of violation of Const 1963, art 4, § 24.

V

A

Having found that Michigan's assisted suicide statute does not violate Const 1963, art 4, § 24, we now address whether the statute runs afoul of the United States Constitution. In its opinion of May 10, 1994, the Court of Appeals rejected this argument. So do we.

The Due Process Clause of US Const, Am XIV commands the states not to "deprive any person of life, liberty, or property, without due process of law . . . ." Thus, the threshold question in this case is whether the clause encompasses a fundamental right to commit suicide and, if so, whether it includes a right to assistance.

B

Those who assert that there is such a right rely heavily on decisions of the United States Supreme Court in abortion and so-called "right to die" cases. Focusing especially on *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 505 US ___; 112 S Ct 2791; 120 L Ed 2d 674 (1992), and *Cruzan* v *Director, Missouri Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990),

these advocates argue that the right to end one's own life is a fundamental liberty interest, grounded in the notion of personal autonomy and springing from common-law concepts of bodily integrity and informed consent. They further contend that an integral part of this protected interest is the right to assistance, hence the term "assisted suicide."[27]

We do not discern in *Cruzan* and its historic roots an indication that the federal constitution protects a right more expansive than the right to refuse to begin or to continue life-sustaining medical treatment. Neither do we find in *Casey* or in the precedent from which it evolved an intent to expand the liberty interests identified by the Court in such a manner.

C

Cruzan was the first case to present to the United States Supreme Court the issue whether the federal constitution grants a so-called "right to die."[28] 497 US 277. The Court was asked in *Cruzan* to decide the validity of a state statute that prohibited a Missouri couple from halting the artificial nutrition and hydration of their brain-damaged daughter, absent clear and convincing evidence of her wishes.

In upholding the Missouri statute, the majority observed that the constitutional right of a competent person, to refuse unwanted medical treatment could be inferred from prior Supreme Court decisions.[29] 497 US 278. For purposes of analysis, the Court "assumed" that there also was a constitutional right to halt lifesaving hydration and nutrition. However, the Court emphasized that such a liberty interest would have to be balanced against relevant state interests. The interests advanced in *Cruzan* — the preservation of life[30] and the safeguarding of an incompetent person's wishes against

potential abuses — were found sufficient to sustain the evidentiary requirement.[31]

Casey was decided two years after *Cruzan*. There, the Court was asked to decide the validity of a Pennsylvania abortion statute that included an "informed consent" requirement, a waiting period, and a "spousal notification" provision. In upholding all but the notification provision,[32] the Court reaffirmed the essential tenet of *Roe* v *Wade*, 410 US 113, 93 S Ct 705; 35 L Ed 2d 147 (1973), reh den 410 US 959 (1973), which includes recognition of a woman's right under the Due Process ClaUse to terminate a pregnancy in its early stages, without undue interference from the state. That right is protected by "a promise of the Constitution that there is a realm of personal liberty which the government may not enter." 120 L Ed 2d 695.

The *Casey* Court explained that *Roe* "stands at the intersection of two lines of decisions . . . ." 120 L Ed 2d 701. Although this holding of *Roe* was grounded in a liberty interest relating to intimate relationships, the family, and childbearing, *Roe* also may be seen as a rule "of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." 120 L Ed 2d 702. The choice of doctrinal category made no difference to the result in Casey, the Court said. It added that *Roe* also could be classified as sui generis. *Id.* at 701-702.

Drawing from *Cruzan* and *Casey*, the *Hobbins* plaintiffs[33] and defendant Kevorkian advance several theories why this Court should find that there is a protected liberty interest in assisted suicide, at least with regard to the terminally ill.[34] All of the theories, of course, assume a fundamental liberty interest in suicide itself.[35]

The parties contend that the right to assistance in ending one's life is an integral part of "personal autonomy."[36] They emphasize that the *Casey* Court rejected a "formula" approach to deciding which rights are protected by the Fourteenth Amendment, and also the notion that new rights cannot emerge. Instead, the Court described the characteristics that are shared by protected "liberty" interests:

> These matters [marriage, procreation, contraception, family relationships, child rearing, and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. [120 L Ed 2d 698.]

The proponents of assisted suicide further argue that the right to commit suicide is analogous to the right to refuse unwanted medical treatment, to discontinue life support, to use contraception, and to choose abortion. They submit that the decision to end one's life is the ultimate right of self- determination, and that the state cannot abridge the right unless it can articulate a compelling interest.[37]

The advocates of assisted suicide ask us to adopt the reasoning of a recent federal decision that invalidated the State of Washington's criminal prohibition against assisted suicide. The court held in *Compassion in Dying* v *Washington*, 850 F Supp 1454, 1461 (WD Wash, 1994),[38] that the right of a terminally ill person to the assistance

of a physician in committing suicide is analogous to the right of abortion because both fall within the "'realm of personal liberty which the government may not enter.'"[39]

The federal court found that the rationale in *Casey* was "almost prescriptive" of the right to end one's life. The court held that, under Casey, the state cannot proscribe assisted suicide if such a ban would unduly burden the right to commit suicide, i.e., if the purpose of the ban is to place a substantial obstacle in the path of the person seeking to exercise the right.

The federal court also found that the right of a terminally ill person to commit suicide with assistance does not differ in a constitutional sense from the right recognized in *Cruzan* to refuse life-sustaining medical treatment.[40] The essential premise of the court's holding was that, in each instance, the liberty interest is "the freedom to make choices according to one's individual conscience about those matters which are essential to personal autonomy and basic human dignity." *Id.* at 1461.[41]

We disagree with the federal court that either *Cruzan* or *Casey* preordains that the Supreme Court would find that any persons, including the terminally ill, have a liberty interest in suicide that is protected by the Fourteenth Amendment. Those who assert such a right misapprehend the nature of the holdings in those cases.

D

In *Cruzan*, the Court was able to "assume" a protected liberty interest in the withdrawal of life-sustaining medical treatment because it was able to distinguish between acts that artificially sustain life and acts that artificially curtail life. Although some suggest that this is a distinction without constitutional signifi-

cance — a meaningless exercise in semantic gymnastics — the *Cruzan* majority disagreed[42] and so do we.

Indeed, the notion that there is a difference between action and inaction is not unfamiliar to the law. For example, the distinction between "misfeasance" and "nonfeasance" (the distinction between active misconduct and passive inaction) is deeply rooted in the law of negligence. The reason for the distinction is said to lie in the fact that a defendant creates a new risk of harm by misfeasance, but merely fails to benefit another by nonfeasance. As Dean Prosser explains, the duty to do no wrong is a legal duty, while the duty to protect against wrong is, for the most part, a moral obligation. Prosser & Keeton, Torts (5th ed), § 56, pp 373-374.[43]

Similarly, whereas suicide involves an affirmative act to end a life, the refusal or cessation of life-sustaining medical treatment simply permits life to run its course, unencumbered by contrived intervention. Put another way, suicide frustrates the natural course by introducing an outside agent to accelerate death, whereas the refusal or withdrawal of life-sustaining medical treatment allows nature to proceed, i.e., death occurs because of the underlying condition.[44]

The distinction between the withdrawal of life-sustaining medical treatment and suicide is recognized in the *Guidelines for State Court Decision Making In Life-Sustaining Medical Treatment*, National Center for State Courts (2d ed), pp 143-145 (1992). The guidelines include the following:

> There are significant moral and legal distinctions between letting die (including the use of medications to relieve suffering during the dying process) and killing (assisted suicide/ euthanasia). In letting die, the cause of death is

> seen as the underlying disease process or trauma. In assisted suicide/euthanasia, the cause of death is seen as the inherently lethal action itself.

We agree that persons who opt to discontinue life-sustaining medical treatment are not, in effect, committing suicide. There is a difference between choosing a natural death summoned by an uninvited illness or calamity, and deliberately seeking to terminate one's life by resorting to death-inducing measures unrelated to the natural process of dying. *McKay* v *Bergstedt*, 106 Nev 808, 820; 801 P2d 617 (1990).

In affirming a lower court decision to discontinue artificial sustenance for a profoundly retarded woman who was in a persistent vegetative state, the Supreme Judicial Court of Massachusetts similarly emphasized the "well-settled" principle that withdrawing or refusing life-sustaining medical treatment is not equivalent to attempting suicide. *Guardianship of Jane Doe*, 411 Mass 512, 521; 583 NE2d 1263 (1992), cert den sub nom *Doe* v *Gross*, 503 US ___; 112 S Ct 1512; 117 L Ed 2d 649 (1992). The vigorous dissents in *Doe* were not offered in support of a broader right to die, but rather in recognition of the state's paramount interest in protecting life.[45]

In its first case involving the cessation of life-sustaining medical treatment, the Kentucky Supreme Court found that withdrawal of nutrition and hydration from a person in a persistent vegetative state, and with irreversible brain damage, fits the medical definition of "permit[ting] the natural process of dying." *DeGrella* v *Elston*, 858 SW2d 698, 707 (Ky, 1993). The court cautioned that it was not engaging in "an objective inquiry into the quality of life, but a subjective inquiry into whether the patient wishes the continuation of medical procedures to interdict 'the natural process of dying.'"

> At the point where the withdrawal of life-prolonging medical treatment becomes solely another person's decision about the patient's quality of life, the individual's "inalienable right to life," as so declared in the United States Declaration of Independence and protected by Section One (1) of our Kentucky Constitution, outweighs any consideration of the quality of the life, or the value of the life, at stake. [*Id.* at 702.]

These and other recent decisions of the highest courts of other states bolster our conclusion that *Cruzan* does not portend that the United States Supreme Court would find a fundamental liberty interest in suicide, let alone assisted suicide, that is protected by the Due Process Clause of the Fourteenth Amendment.

E

1

Neither does *Casey* provide support for the position that the Due Process Clause encompasses a fundamental right to commit suicide. In *Casey*, the Court was not directly concerned with the establishment of a new right, but rather with whether the Court should retreat from the right previously recognized in *Roe* v *Wade*. In declining to overrule *Roe*, and relying heavily on the doctrine of stare decisis, the Court emphasized that abortion cases are unique. 120 L Ed 2d 698.

Although the Court in *Casey* was not called upon to determine the merits of a newly asserted due process right, it is well settled that the Due Process Clause shelters both procedural and substantive rights. *Casey*, 120 L Ed 2d 695. The latter includes those rights that have been selectively incorporated from the Bill of Rights, and those that have been found to be "fundamental."

The state argues that in determining those fundamental rights not expressly identified in, but nonetheless protected by, the Due Process Clause, the analysis must be guided by a search for whether the asserted right is implicit in the concept of ordered liberty or deeply rooted in our nation's history and traditions. See *Palko* v *Connecticut*, 302 US 319, 325-326; 58 S Ct 149; 82 L Ed 288 (1937), and *Snyder* v *Massachusetts*, 291 US 97, 105; 54 S Ct 330; 78 L Ed 674 (1934).[46]

Those who urge this Court to find a fundamental liberty interest in suicide under the Due Process Clause challenge the traditional analysis, arguing that the United States Supreme Court articulated in *Casey* a new, broader inquiry to be employed in the adjudication of substantive due process claims. They submit that even if such a right cannot be inferred from *Casey*, it nonetheless exists as a rational extension of those liberty interests previously recognized under a principled application of the proper test for determining whether an asserted right is protected by the Due Process Clause.[47]

We acknowledge that the United States Supreme Court said in *Casey* that courts are to exercise reasoned judgment in assessing claims of substantive due process, and that the analysis is "not susceptible of expression as a simple rule." 120 L Ed 2d 697. However, we need not resolve the debate over whether the Court established a new test because further examination of the principles discussed in *Casey* reveals that the constitutional inquiry described in that case does not fall so far outside the "implicit in the concept of ordered liberty" and "deeply rooted in history and tradition" analysis as to lead to a different conclusion here.

Thus, in the present context, consistent with the observations of Justice Harlan[48] quoted approvingly and

expanded upon in Casey, 120 L Ed 2d 697-698, we must determine whether the asserted right to commit suicide arises from a rational evolution of tradition, or whether recognition of such a right would be a radical departure from historical precepts. We conclude that the principles that guide analysis of substantive due process do not support the recognition of a right to commit suicide.

2

Although acts of suicide are documented throughout the recorded history of England and this nation, we find no indication of widespread societal approval. To the contrary, suicide was a criminal offense, with significant stigmatizing consequences.[49] As a policy matter, and for practical reasons, suicide was not criminalized in most states. 2 LaFave & Scott, Substantive Criminal Law, § 7.8, pp 246-251. Lawmakers recognized the futility of punishment and the harshness of property forfeiture and other consequences. *Id.*

Also, it was assumed that one who committed suicide was suffering from a mental frailty of one sort or another, and thus lacked the necessary mens rea to commit a crime. Marzen, O'Dowd, Crone & Balch, *Suicide: A constitutional right?*, 24 Duquesne L R 1, 63, 69, 85-86, 88-89 (1985).

One who assisted a suicide was accorded no such concession, however.[50] At the time the Fourteenth Amendment was ratified, at least twenty-one of the thirty-seven existing states (including eighteen of the thirty ratifying states) proscribed assisted suicide either by statute or as a commonlaw offense. *Id.* at 76.

Presently, a substantial number of jurisdictions have specific statutes that criminalize assisted suicide,[51] and the Model Penal Code also provides for criminal penalties.[52] Further, nearly all states expressly disapprove of

suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations,[53] or in "living will" statutes.[54] In addition, all states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness,[55] and a number of states allow the use of nondeadly force to thwart suicide attempts.[56]

It is thus incorrect to conclude, on the basis of the absence of criminal penalties for an act of suicide itself and the existence of a pragmatic capacity to commit suicide, that there is a constitutional right to commit suicide.[57] Such a right is not expressly recognized anywhere in the United States Constitution or in the decisions of the United States Supreme Court, and cannot be reasonably inferred.[58] In fact, as we observed earlier in this opinion, those courts that have found a right to refuse to begin or to continue lifesustaining medical treatment have done so only after concluding that such refusal is wholly different from an act of suicide.[59]

Indeed, the United States Supreme Court repeatedly and unequivocally has affirmed the sanctity of human life and rejected the notion that there is a right of self-destruction inherent in any common-law doctrine or constitutional phrase. In Cruzan, the majority observed:

> As a general matter, the States — indeed, all civilized nations — demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death. [497 US 280.]

On the basis of the foregoing analysis, we would hold that the right to commit suicide is neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and tradition. It would be an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition, to declare that there is such a fundamental right protected by the Due Process Clause.

F

We are keenly aware of the intense emotions and competing moral philosophies that characterize the present debate about suicide in general, and assisted suicide in particular. The issues do not lend themselves to simple answers. However, while the complexity of the matter does not permit us to avoid the critical constitutional questions, neither does it, under the guise of constitutional interpretation, permit us to expand the judicial powers of this Court, especially where the question clearly is a policy one that is appropriately left to the citizenry for resolution, either through its elected representatives or through a ballot initiative under Const 1963, art 2, § 9.[60]

We would hold that the Due Process Clause of the federal constitution does not encompass a fundamental right to commit suicide, with or without assistance, and regardless of whether the would-be assistant is a physician.

VI

A

Finally, we turn to the issue presented in the Oakland County case involving the deaths of Sherry Miller and Marjorie Wantz. Their deaths occurred before the enactment of Michigan's ban on assisted suicide, and the

question is whether defendant Kevorkian can be prosecuted for his role in the deaths.

Each woman was said to be suffering from a condition that caused her great pain or was severely disabling. Each separately had sought defendant Kevorkian's assistance in ending her life. The women and several friends and relatives met the defendant at a cabin in Oakland County on October 23, 1991.

According to the testimony presented at the defendant's preliminary examination, the plan was to use his "suicide machine." The device consisted of a board to which one's arm is strapped to prevent movement, a needle to be inserted into a blood vessel and attached to IV tubing, and containers of various chemicals that are to be released through the needle into the bloodstream. Strings are tied to two of the fingers of the person who intends to die. The strings are attached to clips on the IV tubing that control the flow of the chemicals. As explained by one witness, the person raises that hand, releasing a drug called methohexital, which was described by expert witnesses as a fast-acting barbiturate that is used under controlled circumstances to administer anesthesia rapidly.[61] When the person falls asleep, the hand drops, pulling the other string, which releases another clip and allows potassium chloride to flow into the body in concentrations sufficient to cause death.

The defendant tried several times, without success, to insert the suicide-machine needle into Ms. Miller's arm and hand. He then left the cabin, returning several hours later with a cylinder of carbon monoxide gas and a mask apparatus. He attached a screw driver to the cylinder, and showed Ms. Miller how to use the tool as a lever to open the gas valve.

The defendant then turned his attention to Ms. Wantz. He was successful in inserting the suicide-

machine needle into her arm. The defendant explained to Ms. Wantz how to activate the device so as to allow the drugs to enter her blood stream. The device was activated,[62] and Ms. Wantz died.[63]

The defendant then placed the mask apparatus on Ms. Miller. The only witness at the preliminary examination who was present at the time said that Ms. Miller opened the gas valve by pulling on the screw driver. The cause of her death was determined to be carbon-monoxide poisoning.

The defendant was indicted on two counts of open murder. He was bound over for trial following a preliminary examination. However, in circuit court, the defendant moved to quash the information and dismiss the charges, and the court granted the motion.

B

A divided Court of Appeals reversed. *People* v *Kevorkian No 1*, 205 Mich App 180; 517 NW2d 293 (1994). The Court of Appeals majority relied principally on *People* v *Roberts*, 211 Mich 187; 178 NW 690 (1920).

In *Roberts*, the defendant's wife was suffering from advanced multiple sclerosis and in great pain. She previously had attempted suicide and, according to the defendant's statements at the plea proceeding, requested that he provide her with poison. He agreed, and placed a glass of poison within her reach. She drank the mixture and died. The defendant was charged with murder. He pleaded guilty, and the trial court determined the crime to be murder in the first degree.

The defendant appealed. He argued, among other things, that because suicide is not a crime in Michigan, and his wife thus committed no offense, he committed none in acting as an accessory before the fact. The Court rejected that argument, explaining:

> If we were living in a purely common-law atmosphere with a strictly common-law practice, and defendant were charged with being guilty as an accessory of the offense of suicide, counsel's argument would be more persuasive than it is. But defendant is not charged with that offense. He is charged with murder and the theory of the people was that he committed the crime by means of poison. He has come into court and confessed that he mixed poison with water and placed it within her reach, but at her request. The important question, therefore, arises as to whether what defendant did constitutes murder by means of poison. [211 Mich 195.]

After discussing a similar Ohio case, *Blackburn* v *State*, 23 Ohio St 146 (1872), the *Roberts* Court concluded:

> We are of the opinion that when defendant mixed the paris green with water and placed it within reach of his wife to enable her to put an end to her suffering by putting an end to her life, he was guilty of murder by means of poison within the meaning of the statute, even though she requested him to do so. By this act he deliberately placed within her reach the means of taking her own life, which she could have obtained in no other way by reason of her helpless condition. [211 Mich 198.]

In the instant case, defendant Kevorkian had argued that the discussion of this issue in *Roberts* was dicta because the defendant in that case had pleaded guilty of murder, and thus the controlling authority was *People* v Campbell, 124 Mich App 333, 335 NW2d 27 (1983).[64] The Court of Appeals majority rejected that view and said that *Roberts* controlled the issue presented in the instant case.

C

We agree with the Court of Appeals that the holding in *Roberts* was not dicta.[65] While it is true that defendant Roberts pleaded guilty of placing a poisonous mixture at the bedside of his sick wife, knowing that she intended to use it to commit suicide, nothing in the opinion indicates that this Court based its affirmance of the conviction of first-degree murder on the fact that the conviction stemmed from a guilty plea.

However, it is not sufficient in the instant case to decide simply that the holding in *Roberts* was not dicta. We must determine further whether *Roberts* remains viable, because, as noted in *People* v *Stevenson*, 416 Mich 383, 390; 331 NW2d 143 (1982):

> This Court has often recognized its authority, and indeed its duty, to change the common law when change is required.[66]

The crime of murder has been classified and categorized by the Legislature, see MCL 750.316; MSA 28.548 and MCL 750.317; MSA 28.549, but the definition of murder has been left to the common law. *People* v *Aaron*, 409 Mich 672; 299 NW2d 304 (1980); *People* v *Scott*, 6 Mich 287 (1859). Unless abrogated by the constitution, the Legislature, or this Court, the common law applies. Const 1963, art 3, § 7; *Aaron*, *supra* at 722-723.

Under the common-law definition, "'[m]urder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in peace of the state, with malice prepense or aforethought, either express or implied.'" *Aaron*, *supra* at 713, quoting *People* v *Potter*, 5 Mich 1 (1858). Implicit in this definition is a finding that the defendant performed an act that caused the death of another. To convict a defendant of criminal homicide, it must be proven that death occurred as a

direct and natural result of the defendant's act. *People* v *Barnes*, 182 Mich 179, 196; 148 NW 400 (1914). See also *People* v *Flenon*, 42 Mich App 457, 460; 202 NW2d 471 (1972) ("a defendant's [first-degree murder] conviction should only be sustained where there is a reasonable and direct causal connection between the injury and death").

Early decisions indicate that a murder conviction may be based on merely providing the means by which another commits suicide.[67] However, few jurisdictions, if any, have retained the early common-law view that assisting in a suicide is murder. The modern statutory scheme in the majority of states treats assisted suicide as a separate crime, with penalties less onerous than those for murder. See, e.g., 1993 PA 3, which was enacted by our own Legislature.[68]

Recent decisions draw a distinction between active participation in a suicide and involvement in the events leading up to the suicide, such as providing the means. Frequently, these cases arise in the context of a claim by the defendant that the prosecution should have been brought under an assisted suicide statute. The courts generally have held that a person may be prosecuted for murder if the person's acts went beyond the conduct that the assisted suicide statute was intended to cover.

For example, in *People* v *Cleaves*, 229 Cal App 3d 367; 280 Cal Rptr 146 (1991), the defendant was charged with firstdegree murder in the strangulation death of another man. The trial court had refused a defense request to instruct the jury on the statutory offense of aiding and abetting a suicide, and the jury convicted him of second-degree murder.

In deciding whether an instruction on the statutory offense of aiding and abetting suicide should have been

given, the appellate court accepted the defendant's detailed version of the events. The decedent in *Cleaves* was suffering from AIDS and wanted the defendant's assistance in strangling himself. With the defendant's help, the decedent trussed his body in an arched position, with his face down on a pillow. The defendant's role, when the decedent "pulled down" on the truss to effect strangulation, was to put his hand on the decedent's back to steady him. At one point, when the sash slipped from the decedent's neck, the defendant rewrapped it at the decedent's request and retied it to the decedent's hands. By straightening out his body with his feet, the decedent was in sole control of how tight the sash was around his neck. In holding that the trial judge properly refused to instruct the jury under the assisted suicide statute, the appeals court said:

> [The statute] provides: "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." As explained by our Supreme Court, the "key to distinguishing between the crimes of murder and of assisting suicide is the active or passive role of the defendant in the suicide. If the defendant merely furnishes the means, he is guilty of aiding a suicide; if he actively participates in the death of the suicide victim, he is guilty of murder." *In re Joseph G* (1983) 34 Cal 3d 429, 436 [194 Cal Rptr 163, 667 P2d 1176, 40 ALR4th 690]. The statute providing for a crime less than murder "'does not contemplate active participation by one in the overt act directly causing death. It contemplates some participation in the events leading up to the commission of the final overt act, such as furnishing the means for bringing about death, the gun, the knife, the poison, or providing the water, for the use of the person

> who himself commits the act of self-murder. But where a person actually performs, or actively assists in performing, the overt act resulting in death, such as shooting or stabbing the victim, administering the poison, or holding one under water until death takes place by drowning, his act constitutes murder, and it is wholly immaterial whether this act is committed pursuant to an agreement with the victim . . . .'" *People* v *Matlock* (1959) 51 Cal 2d 682, 694 [336 P2d 505; 71 ALR2d 605]. [229 Cal App 3d 375.]

In *Cleaves*, viewing the evidence most favorably for the defense, the court said there were no facts to support the requested instruction on aiding and abetting an assisted suicide. Although the defendant may not have applied pressure to the ligature itself, he admitted that his act of holding the decedent to keep him from falling off the bed was designed to assist the decedent in completing an act of strangulation. "This factual scenario indisputably shows active assistance in the overt act of strangulation," the court said. *Id.* at 376.

Similarly, in *State* v *Sexson*, 117 NM 113; 869 P2d 301 (NM App, 1994), cert den 117 NM 215 (1994), the defendant was charged with first-degree murder in connection with the fatal shooting of his wife. He was convicted of second-degree murder following a bench trial, and argued on appeal that he should have been prosecuted under the state's assisted suicide statute.

The only fact in dispute in *Sexson* was whether it was the defendant or the decedent who actually pulled the trigger of the rifle that killed her. It was not disputed that there was a suicide agreement between the two, and that the pact was genuine. The defendant claimed simply to have held the rifle in position while the decedent pulled the trigger, and that he had failed to then

kill himself because he "freaked out" when the decedent continued to breathe after being shot.

The appellate court rejected the defendant's argument that he could not be prosecuted under the more general murder statute because of the specific assisted suicide statute. In so doing, the court emphasized that the two statutes proscribed different conduct:

> The wrongful act triggering criminal liability for the offense of assisting suicide is "aiding another" in the taking of his or her own life. It is well accepted that "aiding," in the context of determining whether one is criminally liable for their involvement in the suicide of another, is intended to mean providing the means to commit suicide, not actively performing the act which results in death . . . .
>
> There are three different views about the criminal liability of one who, whether pursuant to a suicide pact or not, solicits (by talk) or aids (as by providing the means of self-destruction) another to commit suicide. Occasionally aiding or soliciting suicide has been held to be no crime at all on the ground that suicide is not criminal. That view is most certainly unsound. At one time many jurisdictions held it to be murder, but a great many states now deal specifically with causing or aiding suicide by statute, treating it either as a form of manslaughter or as a separate crime. Such statutes typically do "not contemplate active participation by one in the overt act directly causing death," and thus their existence is not barrier to a murder conviction in such circumstances.
>
> In contrast, the wrongful act triggering criminal liability for second degree murder is

> "kill[ing]" or "caus[ing] the death" of another. In the context of the instant case, the second degree murder statute is aimed at preventing an individual from actively causing the death of someone contemplating suicide, whereas the assisting suicide statute is aimed at preventing an individual from providing someone contemplating suicide with the means to commit suicide. Thus, the two statutes do not condemn the same offense. . . . [117 NM ___; 869 P2d 304 (citations omitted).]

Turning to the evidence presented in *Sexson*, the court reiterated that the distinction accepted in other jurisdictions between murder and aiding suicide "generally hinges upon whether the defendant actively participates in the overt act directly causing death, or whether he merely provides the means of committing suicide." 869 P2d 304-305. This distinction applies even where the decedent has given consent or requested that actual assistance be provided. In *Sexson*, the defendant admitted holding the rifle in a position calculated to assure the decedent's death. The court concluded- "That action transcends merely providing Victim a means to kill herself and becomes active participation in the death of another." 869 P2d 305.

In the years since 1920, when *Roberts* was decided, interpretation of causation in criminal cases has evolved in Michigan to require a closer nexus between an act and a death than was required in *Roberts*. See, e.g., *People* v *Flenon*, *supra*; *People* v *Scott*, 29 Mich App 549, 558; 185 NW2d 576 (1971). The United States Supreme Court also has addressed the importance of relating culpability to criminal liability. See *Tison* v *Arizona*, 481 US 137; 107 S Ct 1676; 95 L Ed 2d 127 (1987); *Mullaney* v *Wilbur*, 421 US 684, 697-698; 95 S Ct 1881; 44 LEd 2d 508 (1975).

In the context of participation in a suicide, the distinction recognized in *In re Joseph G, supra* at 436, constitutes the view most consistent with' the overwhelming trend of modern authority. There, the California Supreme Court explained that a conviction of murder is proper if a defendant participates in the final overt act that causes death, such as firing a gun or pushing the plunger on a hypodermic needle. However, where a defendant is involved merely "in the events leading up to the commission of the final overt act, such as furnishing the means . . . ," a conviction of assisted suicide is proper. *Id.*

As noted, this Court has modified the common law when it perceives a need to tailor culpability to fit the crime more precisely than is achieved through application of existing interpretations of the common law. See, e.g., *Stevenson, supra*; *Aaron, supra*. For the reasons given, we perceive such a need here. Accordingly, we would overrule *Roberts* to the extent that it can be read to support the view that the common-law definition of murder encompasses the act of intentionally providing the means by which a person commits suicide.[69] Only where there is probable cause to believe that death was the direct and natural result of a defendant's act can the defendant be properly bound over on a charge of murder.[70] Where a defendant merely is involved in the events leading up to the death, such as providing the means, the proper charge is assisting in a suicide.

However, even absent a statute that specifically proscribes assisted suicide, prosecution and punishment for assisting in a suicide would not be precluded. Rather, such conduct may be prosecuted as a separate common-law offense under the saving clause of MCL 750.505; MSA 28.773:[71]

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $ 10,000.00, or both in the discretion of the court.[72]

Our reinterpretation of the common law does not enlarge the scope of criminal liability for assisted suicide, but rather reduces liability where a defendant merely is involved in the events leading up to the suicide, such as providing the means. Therefore, there is no violation of the prohibition on ex post facto laws. US Const, art I, § 9; Const 1963, art 1, § 10. See *Stevenson*, *supra* at 399-400.

D

The decision regarding whether an examining magistrate erred in binding a defendant over for trial is one that should be made in the first instance by the trial court. In this case, the lower courts did not have the benefit of the analysis set forth in this opinion for evaluating the degree of participation by defendant Kevorkian in the events leading to the deaths of Ms. Wantz and Ms. Miller.[73] Accordingly, we remand this matter to the circuit court for reconsideration of the defendant's motion to quash in light of the principles discussed in this opinion.[74]

VII

For the reasons given, we would reverse the Judgment of the Court of Appeals in Docket Nos. 99591 and 99759, and remand the cases to the respective circuit courts for further proceedings. In Docket Nos. 99752 and 99758,

we would reverse the judgment of the Court of Appeals with regard to the claimed violation of Const 1963, art 4, § 24, and affirm in all other respects. Finally, in Docket No. 99674, we would vacate the Judgment of the Court of Appeals, and remand the case to the circuit court for further proceedings in accordance with this opinion.

/s/ Michael F. Cavanagh
/s/ James H. Brickley
/s/ Robert P. Griffin

FOOTNOTES

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1 The circuit court found that the two patients, a psychiatrist, and a pharmacist had standing to challenge the statute, but that the other plaintiffs did not. The Court of Appeals did not discuss the standing question, and it has not been raised here.

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2 The standard that the trial court had announced was the following:

> [T]his Court finds that when a person's quality of life is significantly impaired by a medical condition and the medical condition is extremely unlikely to improve, and that person's decision to commit suicide is a reasonable response to the condition causing the quality of life to be significantly impaired, and the decision to end one's life is freely made without undue influence, such a person has a constitutionally protected right to commit suicide.

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3 The Court of Appeals did not discuss the question of standing, and it has not been raised in this Court.

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4 As permitted by statute, the indictment did not specify the degree of murder. See MCL 750.318; MSA 28.550, MCL 767.71; MSA 28.1011.

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5 The defendant also had been indicted on one count of delivering a controlled substance for other than legitimate and professionally recognized purposes. MCL 333.7401(1); MSA 14.15(7401)(1). However, the district judge dismissed the drug count.

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6 *Hobbins* v *Attorney* General, 205 Mich App 194; 518 NW2d 487 (1994).

[7] The majority opinion was written by Judge E. Thomas Fitzgerald. The other judges on the panel, Clifford W. Taylor, and Washtenaw Circuit Judge Donald E. Shelton, sitting by assignment, wrote separate opinions. Judge Shelton concurred with regard to the art 4, § 24 issue, but dissented with regard to the United States constitutional violation. Judge Taylor concurred that the statute did not violate the United States Constitution, but would have found no art 4, § 24 violation.

[8] *People* v *Kevorkian No 1*, 205 Mich App 180; 517 NW2d 293 (1994).

[9] The opinion was written by judge Fitzgerald, and concurred in by Judge Taylor. Judge Shelton dissented.

[10] The title of the bill read:

> A bill to create the Michigan commission on death and dying; to prescribe its membership, powers, and duties; and to provide for the development of legislative recommendations concerning certain issues related to death and dying.

[11] Two other bills had been pending at the time of the introduction of HB 4501 that included criminal penalties for assisting suicide. HB 4038; SB 32. The language added to HB 4501 was very similar to that of SB 32.

[12] The title was amended to reflect the presence of the new provisions:

> A bill to create the Michigan commission on death and dying, to prescribe its membership, powers, and duties, to provide for the development of legislative recommendations concerning certain issues related to death and dying, *to prohibit certain acts pertaining to the assistance of suicide; to prescribe penalties; and to repeal certain parts of this act on a specific date.* [Emphasis added.]

[13] MCL 752.1027; MSA 28.547(127). It also provided that the criminal provisions would expire six months after the commission reported to the Legislature.

[14] Under 1993 PA 3, the provision that makes it illegal to assist in a suicide reads as follows:

> (1) A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal assistance to suicide, a felony punishable by

imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both:

(a) Provides the physical means by which the other person attempts or commits suicide.

(b) Participates in a physical act by which the other person attempts or commits suicide.

(2) Subsection (1) shall not apply to withholding or withdrawing medical treatment.

(3) Subsection (1) does not apply to prescribing, dispensing, or administering medications or procedures if the intent is to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death.

(4) This section shall take effect February 25, 1993.

(5) This section is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4. [MCL 752.1027, MSA 28.547(127).]

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15 As enacted, the title read as follows:

An act to prohibit certain acts pertaining to the assistance of suicide; to provide for the development of legislative recommendations concerning certain issues related to death and dying, including assistance of suicide; to create the Michigan commission on death and dying; to prescribe its membership, powers, and duties; to prescribe penalties; and to repeal certain parts of this act on a specific date.

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16 Similar language has been in each Michigan Constitution since 1850. Const 1850, art 4, §§ 20, 25; Const 1908, art 5, §§ 21, 22.

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17 As noted above, the circuit court in the Wayne County assisted suicide case rejected the art 4, § 24 challenge.

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18 The Court of Appeals majority said that although the statute encompasses a single "subject," it has two primary objectives. As noted earlier, the Court of Appeals reached that conclusion by artificially selecting as the object of the bill its content as originally introduced. Further, the terms "subject" and "object" are largely equivalent for the purpose of analyzing these issues, and are often used interchangeably by the courts, e.g., *Livonia* v *Dep't of Social Services*, 423 Mich 466, 499; 378 NW2d 402 (1985); *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 465-466; 208 NW2d 469 (1973). Even the Court of Appeals majority did so in the instant case:

The purpose of the one-object provision is to avoid bringing into one bill diverse subjects that have no neces-

sary connection. *Mooahesh* [v *Treasury Dep't*, 195 Mich App 551, 564; 492 NW2d 246 (1992)]. [205 Mich App 199.]

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19 For example, in *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 123, 240 NW2d 193 (1976), the statute (1) established a political ethics commission, (2) set forth requirements for candidate committees, (3) imposed filing statements with respect to contributions and expenditures, (4) placed limits on campaign expenditures, (5) established a state campaign fund, (6) regulated lobbying activities, and (7) repealed five existing laws.

In *People* v *Carey*, 382 Mich 285; 170 NW2d 145 (1969), this Court held that it was improper to include in the statute dealing with the supervision, regulation, and control of motor vehicles for hire, a provision purporting to give inspectors appointed by the Public Service Commission the same powers as police officers.

In *Hildebrand* v *Revco Discount Drug Centers*, 137 Mich App 1; 357 NW2d 778 (1984), the Court of Appeals found it unconstitutional to include in the Michigan Civil Rights Act a provision restricting the use of polygraph results in employment decisions.

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20 In *Builders Square* v *Agriculture Dep't*, 176 Mich App 494, 499; 440 NW2d 639 (1989), it was argued that the statute had two objects — regulation of pricing and regulation of deceptive advertising. However, the Court of Appeals rejected that contention and upheld the constitutionality of the act:

> We do not believe the item pricing and deceptive advertising act violates the title-object clause of the Michigan Constitution. The purpose of title-object clause, namely notice, was satisfied. Although dissimilar, the act's two objectives, regulation of pricing and advertising, are not so diverse in nature as to be at odds with the constitution. Further, the objects are consistent with the overall purpose, consumer protection. Since the title of the act need not be an index of its provisions, it is inconsequential that the act fails to mention consumer protection. A fair reading of the title demonstrates its purpose.

Jacobson v *Carlson*, 302 Mich 448; 4 NW2d 721 (1942), involved an amendment of the motor vehicle statute that dealt solely with the subject of pedestrians and sidewalks. This Court found that statute not to be in violation of the Title-Object Clause.

In *Kull* v *State Apple Comm*, 296 Mich 262; 296 NW 250 (1941), this Court upheld an act that contained provisions ranging from promoting the consumption and sale of apples to taxing apple production, creating an apple commission, and providing penalties. While the act addressed four seemingly diverse matters, it was proper to join them because all related to the regulation of the apple industry.

[21] The Public Health Code includes criminal penalties for controlled substance violations as well as many other provisions. MCL 333.1101 *et seq.*; MSA 14.15(1101) *et seq.*

[22] The *Trupiano* Court said:

> The Supreme Court has recognized a wide degree of discretion in reviewing legislative enactments which constitute a "code." In *Advisory Opinion re Constitutionality of 1972 PA 294, supra*, the Court noted at 463:
>
> > "Emphasis is given to the fact that the subject matter constitutes a code and that inherently the scope of a code must be broad enough to encompass the various facets necessary to the drafting of a unified law. If we fail to permit such a design codes may not be enacted in Michigan so long as the 'one-object' limitation is present in the constitution." [*Trupiano* at 420.]

[23] In fact, the instant statute might well be upheld even if that principle were valid. The criminal penalties section provides that it "is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4." Thus, it could not have been separately enacted without reference to the commission provisions.

[24] As noted earlier, although the Court of Appeals majority did not address this issue, the circuit court in both the Oakland County assisted suicide case and the declaratory judgment action found a change of purpose challenge to be meritorious.

[25] See, e.g., *United States Gypsum Co* v *Dep't of Revenue*, 363 Mich 548; 110 NW2d 698 (1961); *Commuter Tax Ass'n* v *Detroit*, 109 Mich App 667; 311 NW2d 449 (1981); *People* v *Clopton*, 117 Mich App 673; 324 NW2d 128 (1982).

[26] See, e.g., *People* v *De Blaay*, 137 Mich 402, 404-405; 100 NW 598 (1904), *Briggs* v *Campbell, Wyant & Cannon Foundry Co*, 2 Mich App 204, 218-219; 139 NW2d 336 (1966), and *Kriger* v *South Oakland Co Mutual Aid Pact*, 49 Mich App 7, 13-15; 211 NW2d 228 (1973) (amendment cured title-object defect), rev'd on other grounds 399 Mich 835 (1977).

[27] The *Hobbins* plaintiffs object to the term "assisted suicide." They concede that there is no right under the Due Process Clause to commit "ordinary" suicide, with or without assistance. They assert only the right of mentally competent, terminally ill persons "to make the choice to hasten inevitable death," particularly by the use of lethal quantities of physician-prescribed medications. How-

ever, the common definition of "suicide" is the intentional killing of oneself by any means, and the temporal proximity of death is irrelevant to the threshold inquiry into whether the constitution encompasses such a right. We thus do not believe that it would be appropriate to use euphemistic language, even in the context of a challenge that purports to be limited to the plight of the terminally ill. We agree with the Attorney General that there is a risk that such phraseology will disguise the reality of the very sober questions that we must decide.

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28 The case generally regarded as the landmark decision concerning the refusal of life-sustaining medical treatment is *In re Quinlan*, 70 NJ 10, 355 A2d 647 (1976), cert den sub nom *Garger* v *New Jersey*, 429 US 922 (1976). In *Quinlan*, the New Jersey Supreme Court reasoned that a comatose young woman had a privacy right grounded in the federal constitution to be free from bodily invasion by further treatment (a respirator), that the right was not diminished by her mental incompetency, and that her father could refuse such treatment on her behalf.

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29 In tracing the history of cases involving the right to refuse medical treatment, the Court discussed the doctrine of informed consent that embraces the common-law notion of "bodily integrity," i.e., "the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 497 US 269, quoting *Union Pacific R Co* v *Botsford*, 141 US 250, 251; 11 S Ct 1000, 35 L Ed 734 (1891). The *Cruzan* Court said that the logical corollary of the doctrine of informed consent is that a patient generally has a right *not* to consent, i.e., a right to refuse treatment.

By footnote, the Court observed that although many state courts had found a right to refuse medical treatment in a generalized constitutional right of privacy, the Supreme Court had not. Rather, the Court had determined that the issue more properly is analyzed in terms of a Fourteenth Amendment liberty interest. See *Cruzan*, 497 US 279, n 7, citing *Bowers* v *Hardwick*, 478 US 186, 194-195; 106 S Ct 2841; 92 LEd 2d 140 (1986).

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30 The Court said that the state could "properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . ." *Id.* at 282.

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31 The *Cruzan* Court said that the "clear and convincing evidence" standard was appropriate not only because of the importance of the interests at issue, but also because the standard serves as a "societal judgment" about how the risk of error should be distributed between the litigants. "The more stringent the burden of proof a party must bear, the more that party bears the risk of an

erroneous decision." In the case of an effort to terminate life-sustaining medical treatment for an incompetent person, an erroneous decision to continue treatment simply maintains the status quo. An erroneous decision to stop such treatment, however, is not susceptible to correction. 497 US 283.

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32 With respect to the notification provision, the Court observed:

> It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman. [120 L Ed 2d 727.]

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33 The Attorney General contends that the *Hobbins* plaintiffs are presenting a facial challenge to the statute, and that their claim thus must fail if there is any set of circumstances under which the assisted suicide statute would be valid. *United States* v *Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). The plaintiffs argue that *Casey* changed the analysis for a liberty interest, and that *Salerno* is not applicable. Both positions, however, assume too much. Before a facial challenge analysis can proceed, it first must be determined whether there is a constitutionally protected right. In light of our decision that there is no liberty interest in committing suicide, it is unnecessary for us to determine the proper analysis.

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34 No clear definition of "terminal illness" is medically or legally possible, since only in hindsight is it known with certainty when someone is going to die. One definition that has been suggested is an illness so progressed that death is likely within twelve months. Note, *A failed statute, Geoffrey Feiger [sic], and the phrenetic physician: Physician-assisted suicide in Michigan and a patient-oriented alternative*, 28 Val Univ L R 1415, 1434, n 121 (1994). Another definition appears in MCL 333.21417; MSA 14.15(21417), which concerns eligibility for admission to a hospice:

> An individual shall be considered to have a disease or condition with a terminal prognosis if, in the opinion of a physician, the individual's death is anticipated within 6 months after the date of admission to the hospice.

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35 An attempt to find a liberty interest in assisted suicide independent of a liberty interest in suicide itself cannot succeed. If the Due Process Clause does not encompass a fundamental right to end one's life, it cannot encompass a right to assistance in ending one's life.

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36 One commentator points out that assertion of a right of personal autonomy begs the question, "'[a]utonomy to do what?'" Tsarouhas, *The case against legal assisted suicide*, 20 Ohio Northern Univ L R 793, 803 (1994).

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37 While acknowledging that the state may regulate assistance in suicide, or even actively discourage one from committing suicide, in order to advance its interest in preserving life, the proponents of assisted suicide maintain that the state's legitimate interest does not extend to prolonging suffering of the terminally ill by criminalizing suicide assistance. We find it unnecessary to consider the proper reach of the state's regulatory interest because we disagree with the foundational premise that there exists a constitutionally protected liberty interest to commit suicide.

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38 Appeal pending in the United States Court of Appeals for the Ninth Circuit (Docket No. 94-35534).

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39 The federal court appears to have limited its ruling to situations in which the person who wants to die performs the final act that actually brings about death. The case concerned the right to commit suicide "by taking a lethal dose of physician-prescribed drugs." *Id.* at 1456.

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40 The court recognized that the Supreme Court only had "assumed" such an interest in *Cruzan* for purposes of analysis, but expressed confidence that if the issue was squarely presented, such a right would be found.

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41 In this regard, we observe that a right of personal autonomy cannot exist independent of a recognition of human dignity, and that it would violate the concept of human dignity to measure the value of a person's life by that person's physical and mental condition. See *Cruzan*, 497 US 282. Further, because all persons possess a basic right to personal autonomy, regardless of their physical or mental condition, there would be no principled basis for restricting a right to commit suicide to the terminally ill. The inevitability of death adds nothing to the constitutional analysis.

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42 Further, the *Cruzan* Court was careful not to extend its decision in that case even to other issues concerning medical treatment:

> [I]n deciding "a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject." [497 US 277-278.]

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43 Professor Kamisar suggests that the distinction is based more on historical and pragmatic compromise than on logic. He reasons

that what is at issue are what Dean Guido Calabresi of Yale Law School called "tragic choices," i.e., choices that confront us when fundamental beliefs clash. The goal is to find "solutions that permit us to assert that we are cleaving to both beliefs in conflict." Concerning the issue of refusing to begin or to continue life-sustaining medical treatment, the conflict is between (a) respecting a patient's wishes, relieving suffering, and putting an end to seemingly futile medical treatment, and (b) affirming the supreme value of life and maintaining the salutary principle that the law protects all human life, no matter how poor the quality. The professor concludes that the distinction between assisted suicide and "letting die" is not perfectly neat and logical, then asks, "But what line is?" Kamisar, *After assisted suicide, what next?*, Texas Lawyer (June 13, 1994), pp 1-2.

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44 A close examination of the medical-treatment cases suggests that they do not establish a right to choose "nonlife" at all, but rather a right to choose life's natural progression — a progression that, without fail, includes for everyone the process of dying.

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45 One dissenting justice, for instance, accused the court of deciding "to play God." 411 Mass 525. He complained that the court had involved itself in the matter ostensibly to protect the interests of the vulnerable, but then had taken advantage of the patient's vulnerability "to fashion an argument that she is a social, medical and familial burden and that her simple, fundamental needs should no longer be met." 411 Mass 529. Two other dissenters said that the majority, in effect, had approved the notion of suicide. They wrote:

> Society's respect for the value of every human life without reference to its condition, the cornerstone of American law, is inconsistent with a State's recognition of a legal right to commit suicide, assist suicide, or engage in voluntary euthanasia (mercy killing in accordance with the wishes of the suffering person). "The life of those to whom life has become a burden — of those who are hopelessly diseased or fatally wounded — nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live." Recognition of the dignity of human life demands resistance, rather than concession, to the real or imaginary death wishes of those who are afflicted with pain, depression, a sense of personal worthlessness, or a sense of burdensomeness to others. A humane society provides support of every kind, including moral support, to those who are burdened in order that they may live . . . .
>
> Can it reasonably be doubted that legal acceptance of suicide, assisted suicide, and voluntary euthanasia presents a serious risk that acceptance of involuntary euthanasia

(mercy killing not chosen by the affected individual) is soon to follow? [411 Mass 531-532 (citation omitted).]

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46 See also *Michael H* v *Gerald D*, 491 US 110, 121-122; 109 S Ct 2333; 105 L Ed 2d 91 (1989).

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47 As suggested by various amici curiæ, it is important to the analysis of substantive due process that the asserted right be framed in a precise and neutral manner. This is critical in cases involving end-of-life questions, which are particularly susceptible to emotion-laden terminology and flawed syllogisms. The approach of the United States Supreme Court in assessing whether a proposed right is "fundamental" has been to narrow the threshold inquiry by applying three principles: (1) the focus should be on the specific activity that proponents argue is protected by the constitution, taking into account all relevant facts, (2) the formulation should not be so broad as to encompass activities that are logically distinct and involve separate considerations, and (3) the formulation should reasonably accommodate all of the interests at stake. Bopp & Coleson, *Webster and the future of substantive due process*, 28 Duquesne L R 271, 281-291 (1990). See *Webster* v *Reproductive Health Services*, 492 US 490; 109 S Ct 3040; 106 L Ed 2d 410 (1989).

The question presented in this case thus is not whether a person has a constitutional right of self-determination, or a right to define personal existence, or a right to make intimate and personal choices, or a right not to suffer. Rather, the question that we must decide is whether the constitution encompasses a right to commit suicide and, if so, whether it includes a right to assistance.

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48 *Poe* v *Ullman*, 367 US 497, 542; 81 S Ct 1752; 6 L Ed 2d 989 (1961) (Barian, J., dissenting from dismissal on jurisdictional grounds).

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49 At common law, suicide sometimes was referred to as "self murder." Consequences included the forfeiture of property and an ignominious burial. Tsarouhas, n 36 *supra* at 795, citing Glanville, *The Sanctity of Life and the Criminal Law*, 261-62 (1957), and 4 Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769), pp 189, 190.

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50 There is no historical exception for physician-assisted suicide. To the contrary, such involvement traditionally has been regarded as contrary to the Hippocratic Oath, which includes the following sentence: "'To please no one will I prescribe a deadly drug, nor give advice which may cause his death.'" Steadman's Medical Dictionary (5th Unabridged Lawyers' Ed), p 650.

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51 Alaska, Alas Stat 11.41.120(a)(2); Arizona, Ariz Rev Stat Ann 13-1103 (A) (3); Arkansas, Ark Code Ann 5-10-104(a)(2); California, Cal

Penal Code 401; Colorado, Colo Rev Stat 18-3-104(1)(b); Connecticut, Conn Gen Stat Ann 53a-56(a)(2); Delaware, Del Code Ann, tit 11, § 645; Florida, Fla Stat Ann 782.08; Georgia, Ga Code Ann 16-5-5(b); Hawaii, Hawaii Rev Stat 707-702 (1)(b); Illinois, 720 Ill Comp Stat Ann 5/12-31; Indiana, Ind Stat Ann 35-42-1-2; Kansas, Kan Stat Ann 21-3406; Kentucky, Ky Rev State 216-302; Maine, Me Rev Stat Ann, tit 17-A, §204; Michigan, Act of December 15, 1992, 1992 PA 270 (creating Michigan commission on death and dying and prohibiting certain acts pertaining to suicide assistance); Minnesota, Minn Stat Ann 609,215; Mississippi, Miss Code Ann 97-3-49; Missouri, Mo Rev Stat 565,023; Montana, Mont Code Ann 45-5-105; Nebraska, Neb Rev Stat 28-307; New Hampshire, NH Rev Star Ann 630:4; New Jersey, NJ Stat Ann 2C-11-6; New Mexico, NM Stat Ann 30-2-4; New York, NY Penal Law 120.30; North Dakota, ND Cent Code 12.1-16-04; Oklahoma, Okla Stat Ann, tit 21, §§ 813 to 818; Pennsylvania, 18 Pa Cons Stat Ann 2505; Puerto Rico, PR Laws Ann, tit 33, § 4009; South Dakota, SD Codified Laws Ann 22-16-37; Tennessee, Tenn Code Ann 39-13216; Texas, Tex Penal Code Ann 22.08; Virgin Island, Vi Code, tit 14, § 2141; Washington, Wash Rev Code Ann 9A.36.060; and Wisconsin, Wis Stat Ann 940.12. The State of Oregon also has a statute that forbids assisted suicide. Or Rev Stat 163.125(1)(b). However, we note that Oregon voters passed a ballot initiative called the Death with Dignity Act on November 8, 1994. The act, which permits physicians, under certain circumstances, to prescribe lethal medication for terminally ill persons, was scheduled to take effect December 8, 1994. However, a federal district court has issued a temporary restraining order pending a hearing on the matter.

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[52] The Model Penal Code of the American Law Institute prohibits assisted suicide and grants a privilege to those who use force to prevent a suicide. Sections 210.5, p 91, and 3.07(5), pp 104-105.

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[53] See, for example, MCL 700.496; MSA 27.5496, which permits the appointment of a "patient advocate" to act on the patient's behalf if the patient is not competent to do so. Subsection 20 of the statute states that designation of a patient advocate "shall not be construed to condone, allow, permit, authorize, or approve suicide or homicide." MCL 700.496(20); MSA 27.5496(20). Other jurisdictions with similar provisions in statutes governing durable powers of attorney in health-care situations include the District of Columbia, DC Code Ann 21-2212; Illinois, Ill Comp Stat Ann, ch 755, § 40/50; Indiana, Ind Code Ann 30-5-5-17(b); Iowa, Iowa Code Ann 144B.12.2; Massachusetts, Mass Ann Laws, ch 201D, § 12; New York, NY Pub Health 2989(3); North Dakota, ND Cent Code 23-06.5-01; and Rhode Island, RI Gen Laws 23-4.10-9(f).

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[54] Jurisdictions that have such provisions in "living will" statutes include Alabama, Ala Code 22-8A-10; Alaska, Alas Stat 18.12,080(f); Arizona, Ariz Rev Stat Ann 36-3210; Arkansas, Ark Code Ann 20-17-

210(g); California, Cal Health & Safety Code 7191.5(g); Colorado, Colo Rev Stat 15-18-112(1); District of Columbia, DC Code Ann 6-2430; Florida, Fla Stat Ann 765.309(1); Georgia, Ga Code Ann 88-4111(b); Hawaii, Hawaii Rev Stat 327D-13; Illinois, Ill Comp Stat Ann, ch 755, § 35/9(f); Indiana, Ind Code Ann 16-36-4-19; Iowa, Iowa Code Ann 144A.11.6; Kansas, Kan Stat Ann 65-28, 109; Kentucky, Ky Rev Star Ann 311.637; Louisiana, La Rev Stat Ann, 40:1299.58.10.A; Maine, Me Rev Stat Ann, tit 18-A, § 5-711(g); Maryland, Md Health Gen Code Ann 5-611(c); Minnesota, Minn Stat Ann 145B.14; Mississippi, Miss Code Ann 41-41-117(2); Missouri, Mo Ann Stat 459.055(5); Montana, Mont Code Ann 50-9-205(7); Nebraska, Neb Rev Stat 20-412(7); Nevada, Nev Rev Stat Ann 449.670; New Hampshire, NH Rev Stat Ann 137-H:10(II); North Carolina, NC Gen Stat 90-320(b); North Dakota, ND Cent Code 23-06.4-01; Ohio, Ohio Rev Code Ann, tit 21, § 2133.12(D); Oklahoma, Okla Stat Ann, tit 63, § 3101.12(g); Oregon, Or Rev Stat 127. 645(1); Pennsylvania, 20 Pa Cons Stat Ann 5402(b); Rhode Island, RI Gen Laws 23-4.11-10(f); South Carolina, SC Code Ann 44-77-130; South Dakota, SD Cod Laws Ann 34-12D-20; Texas, Tex Health & Safety Code Ann 672.020; Utah, Utah Code Ann 75-2-1118; Virginia, Va Code Ann 54.1-2990; Washington, Wash Rev Code Ann 70.122.100; West Virginia, W Va Code 16-3010; and Wisconsin, Wis Stat Ann 154.11(6).

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55 See, e.g., MCL 330.1401(a); MSA 14.800(401)(a).

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56 Alas Stat 11.81.430(a)(4); Ark Code Ann 5-10-104(a)(2); Colo Rev Stat 18-1-703(1)(d); Hawaii Rev Stat 703-308(1); Ky Rev Star 503.100(1)(a); Mo Rev Star 563.061(5); NH Rev Star Ann 627:6(VI); NJ Star Ann 2C:3-7(e); NY Penal Law 35.10(4); Or Rev Stat 161.209; 18 Pa Cons Stat Ann 508(d); Wis Stat Ann 939.48(5).

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57 For reasons apparent in our analysis of the due process claims, we also reject the argument that Michigan's assisted suicide statute is invalid because it denies equal protection to terminally ill persons who want help in ending their lives, i.e., it denies them a right enjoyed by terminally ill persons who opt to forgo or discontinue life-sustaining medical treatment. As we explained, the two situations are not the same for purposes of constitutional analysis.

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58 The Supreme Court of Canada said in *Rodriguez* v *British Columbia*, 107 DLR4th 342, 401-404 (1993), that no western democracy expressly permits assisted suicide. To the contrary, the criminal codes of most countries include a blanket ban of such conduct, and such proscriptions have not been adjudged to be unconstitutional or contrary to fundamental human rights.

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59 The right to refuse medical treatment meets the "ordered liberty" and the "historical underpinnings" tests because it is rooted in the common-law doctrine of informed consent, which embodies

the notion of bodily integrity. A person may refuse life-sustaining medical treatment because the treatment itself is a violation of bodily integrity. Suicide enjoys no such foundational support, however. When one acts to end one's life, it is the intrusion of the lethal agent that violates bodily integrity.

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60 We are mindful of Justice Cardozo's admonition nearly half a century ago:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." [The Nature of the Judicial Process, quoted in *In re President & Directors of Georgetown College, Inc*, 118 US App DC 90, 97, 331 F2d 1010 (1964) (Burger, J., concurring in dissent), cert den 377 US 978 (1964).]

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61 A large enough dose can cause the recipient to stop breathing.

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62 No one who testified at the preliminary examination actually witnessed the activation of the device. The only persons in the cabin at that time were the decedents, the defendant, and the defendant's sister, who since has died. Ms. Wantz' husband was walking away from the cabin. He testified as follows:

> Q. You don't know who pulled the string?
>
> A. I have no idea. She knew that she had to pull the string when I left.
>
> Q. You don't know if she tried to pull the string and it didn't work and Kevorkian pushed her hand at all, do you?
>
> A. I can say this, when I left the room she was in the process of trying to pull the string.
>
> Q. You don't know who pulled the string? That's what you're telling me?
>
> A. I can tell you she was in the process of trying to pull the string when I left the room, but I did not see her pull the string. The only thing I can take and tell you is once I left the room, Dr. Kevorkian did — I heard Dr. Kevorkian say, "Marj, you have to hold your hand up," and that is the only thing I know.

63 The pathologist who performed the autopsy testified that there was a lethal level of methohexital in Ms. Wantz' blood, but that because of the body's release of potassium on death, no conclusions could be drawn regarding potassium chloride.

64 In *Campbell*, the decedent and the defendant had been drinking heavily at the decedent's home. The decedent had been talking about suicide, and the fact that he did not have a gun. The defendant offered to sell the decedent a gun. At first, the decedent did not accept the offer. However, defendant Campbell persisted in alternately encouraging and ridiculing him. Eventually, the defendant provided the decedent with a gun and five shells. The defendant and the decedent's girlfriend left, and some time later, the decedent shot himself. The defendant was charged with open murder.

Although the defendant failed to persuade the circuit court to quash the information, the Court of Appeals reversed. Among other things, the Court said that more recent Supreme Court decisions had "cast doubt" that *Roberts* remained good law. The Court also noted that the trial judge in *Roberts* had "assumed that a murder had occurred and considered only the degree of that crime." 124 Mich App 337.

The *Campbell* panel further found that the defendant did not have the required "present intention to kill." He only "hoped" that the decedent would kill himself, and "hope" is not the degree of intent required to sustain a charge of murder. *Id.* at 339.

65 "When a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." *Chase* v *American Cartage Co, Inc*, 176 Wis 235, 238 (186 NW 598 [1922]). [*Detroit* v *Public Utilities Comm*, 288 Mich 267, 299-300; 286 NW 368 (1939).]

66 Citing *People* v *Aaron*, 409 Mich 672, 713; 299 NW2d 304 (1980); *Placek* v *Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979); *Serafin* v *Serafin*, 401 Mich 629; 275 NW2d 461 (1977); *Beech Grove Investment Co* v *Civil Rights* Comm, 380 Mich 405; 157 NW2d 213 (1968); *Myers* v *Genesee Auditor*, 375 Mich 1; 133 NW2d 190 (1965).

67 See *Marzen*, *supra* at 79-81.

68 See also n 51. In addition, the Model Penal Code incorporates this view:

> (1) Causing Suicide as Criminal Homicide. A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.

> (2) Aiding or Soliciting Suicide as an Independent Offense. A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor. [Model Penal Code, § 210.5.]

In commentary to its provision detailing sanctions against suicide assistance, the drafters of the Model Penal Code discussed the rationale supporting its recommendations, as well as expressing concern over the severity of the penalty imposed in *Roberts:*

> The fact that penal sanctions will prove ineffective to deter the suicide itself does not mean that the criminal law is equally powerless to influence the behavior of those who would aid or induce another to take his own life. Moreover, in principle it would seem that the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim. On the other hand, cases such as *People* v *Roberts*, where a husband yielded to the urging of his incurably sick wife to provide her with the means of self-destruction, sorely test the resiliency of a principle that completely fails to take account of the claim for mitigation that such a circumstance presents. [ALA, Model Penal Code § 210.5, commentary at 100.]

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69 Because *Roberts* involved a guilty plea, the facts were not well developed. If in fact the defendant's only act was to prepare the poison and leave it for his Wife to drink, and she did so knowingly and voluntarily, we would not find that sufficient participation to constitute murder. In the suicide setting, it is not enough that the defendant merely provided the means of death to be convicted of murder, or participated in the events leading up to the act that directly caused death if the defendant did not participate in the act that did directly cause death.

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70 However, there may be circumstances where one who recklessly or negligently provides the means by which another commits suicide could be found guilty of a lesser offense, such as involuntary manslaughter. There are a number of cases in which providing a gun to a person known to the defendant to be intoxicated and despondent or agitated has constituted sufficient recklessness to support such a conviction. For example, in *People* v *Duffy*, 79 NY2d 611, 613; 595 NE2d 814 (1992), the defendant provided a gun to the intoxicated and despondent decedent, who had said he wanted to kill himself, and urged him to "blow his head off." The decedent proceeded to shoot himself. Duffy was indicted for two counts of manslaughter in the second degree. The first count alleged that he

had intentionally caused or aided the deceased in committing suicide (NY Penal Law § 125.15[3]), and the second alleged that he had recklessly caused the death (NY Penal Law § 125.15[1]). After a jury trial, the defendant was acquitted of the first count, but convicted of the second. The New York Court of Appeals concluded:

> [T]he conduct with which defendant was charged clearly fell within the scope of section 125.15 (1)'s proscription against recklessly causing the death of another person. As the People aptly observe, a person who, knowing that another is contemplating immediate suicide, deliberately prods that person to go forward and furnishes the means of bringing about death may certainly be said to have "consciously disregard[ed] a substantial and unjustifiable risk" that his actions would result in the death of that person . . . . [79 NY2d 614.]

See also *State* v *Bier*, 181 Mont 27; 591 P2d 1115 (1979); *Persampieri* v *Commonwealth*, 343 Mass 19; 175 NE2d 387 (1961); *State* v *Marti*, 290 NW2d 570 (Iowa, 1980).

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71 Suicide is, by definition, the killing of oneself. Our analysis recognizes a distinction between killing oneself and being killed by another. Because suicide is not murder and is no longer viewed as criminal, see above at pp 38-39, assisting suicide is its own species of crime.

Our opinion would leave undisturbed the law of aiding and abetting because aiding and abetting necessarily requires the commission of an offense by a principal. See *People* v *Kelly*, 423 Mich 261; 378 NW2d 365 (1985).

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72 See *State* v *Carney*, 69 NJL 478, 480; 55 A 44 (1903), (concluding that a failed attempt at suicide was criminal under the New jersey saving clause, which made all "offenses of an indictable nature at common law," not otherwise provided for, misdemeanors); *State* v *Willis*, 255 NC 473; 121 SE2d 854 (1961) (finding an attempt to commit suicide to be an indictable misdemeanor under North Carolina's saving clause).

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73 A lower court's ruling on a motion to quash involving factual matters is reviewed by an appellate court for an abuse of discretion, and rulings regarding issues of law are reversed if erroneous. *People* v *Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991).

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74 Remanding to the circuit court for reconsideration of the motion to quash will not usurp the fact-finding function of the ultimate trier of fact. Bindover decisions by magistrates, and the review of those decisions by trial courts, necessarily involve preliminary factual determinations, although the standard to be employed is one of probable cause rather than guilt beyond a reasonable doubt. MCR 6.110(E).

OPINION CONCURRING IN PART AND DISSENTING IN PART

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JACK KEVORKIAN, Defendant-Appellant — No. 99591; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JACK KEVORKIAN, Defendant-Appellant — No. 99674; TERESA HOBBINS, MARIE DEFORD, KENNETH A. SHAPIRO, KENNETH WEINBERGER, WILLIAM DRAKE, ELLIOT D. LUBY, NORMAN BOLTON, KENNETH TUCKER, KATHRYN UPTON, and B. ELLIOT GRYSON, Plaintiffs-Appellees, v ATTORNEY GENERAL OF MICHIGAN, Defendant-Appellant. — No. 99752)

BOYLE, J. (*concurring in part and dissenting in part*).

I agree with the lead opinion that § 7 of 1993 PA 3 does not violate the Title-Object Clause of the Michigan Constitution[1] in its entirety. I also agree with the lead opinion's result and rationale finding that the act is not violative of a fundamental right protected by the Due Process Clause of the state or federal constitution. In addition, as stated in the observations of Justice Harlan[2] quoted approvingly in *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 505 US ___; 112 S Ct 2791; 120 L Ed 2d 674, 697-698 (1992), and the expansion on those principles that follow, the task of the judiciary is to strike a balance between the respect for the liberty of the individual and the demands of organized society. Such balance should be struck with due respect to history and rationally evolving tradition. Thus, in the present context, the process of rational evolution must focus on a determination whether the question of assisted suicide can be left to the political process without intrusion on a protected liberty interest, eschewing either a radical departure from tradition or the moral code of individual judges. I agree that it can.

[Printer's Note]: **Footnotes 1-10 are reproduced, *infra*, beginning on page A-75.**

I do not agree with the lead opinion's redefinition of the statutory offense of murder to exclude participation in the events leading up to the death, including, without limitation, providing the means and all other acts save that of the final act precipitating death. A person who participates in the death of another may be charged with murder, irrespective of the consent of the deceased. Nor do I agree with the lead opinion's conclusion or rationale justifying a charge of assisted suicide under the saving clause.[3] The saving clause recognizes only unprovided-for common-law crimes, it does not authorize this Court to create new crimes. If assisting a suicide is a common-law crime and not murder under the common-law definition incorporated in our murder statutes, it may be penalized as another crime under the saving clause. The Court, however, cannot simply exclude from the common-law definition of murder that which is murder under our statutes and then hold that the Legislature intended in the saving clause to authorize the Court to say that that which was murder at the common law is now a new crime.

Finally, I disagree with the conclusion that one who provides the means for suicides and participates in the acts leading up to death may not be charged with murder as long as the final act is that of the decedent. In stating this conclusion, the lead opinion has parsed the definition of participation to permit involvement that is dangerously overinclusive. Absent standards established to distinguish between those who are in fact terminally ill or suffering in agony and rationally wish to die and those who are not, there is no principled vehicle in the judicial arsenal to protect against abuse, save the jury's evaluation of a given defendant's conduct. The acts shown in the Oakland County case establish causation as a matter of law for purposes of bindover. Thus, the trial court erred in quashing the

information, and the decision of the Court of Appeals should be affirmed.

I

Criminal homicide has been a statutory offense in Michigan since 1846. The crime is not defined by reference to its elements but by reference to the common law. *People* v *Schmitt*, 275 Mich 575, 577; 267 NW 741 (1936). There is no dispute that at the time these offenses were committed, the Legislature had shown no disposition to depart from the common-law definition of murder as including assisted suicide. The lead opinion today would alter the definition of murder by changing the causation requirement in the context of suicide to exclude from liability for criminal homicide those who intentionally participate in the events that directly cause death with the intention that death occur.

However, the intended results of the plaintiff's acts were the results actually obtained, and the acts were both the cause in fact and the proximate or foreseeable cause of the decedents' deaths. The lead opinion would thus redefine murder as it is defined in our statutes and has created a special causation standard, unknown in any other jurisdiction.

The detailed account of the preliminary examination testimony describing the assisted suicides of Ms. Miller and Ms. Wantz, slip op at 44-47, belies the notion that the degree of participation by the defendant in these events was insufficient to permit a charge of murder even in those states that have adopted separate penalties for soliciting or assisting suicide. Testimony at the preliminary examination presented evidence that the defendant, inter alia, inserted IV needles into Ms. Wantz's arm, tied strings to her fingers so she could release chemicals into her bloodstream, and placed a

mask over Ms. Miller's face so that she could breath carbon monoxide gas. *Id.* at 45-47. The mask was secured so tightly that without intervention that fact alone would have caused death. It cannot be said, as a matter of law, that these actions did not establish probable cause to believe that the defendant committed murder.

The decedents' alleged desire in the present case that they die with the defendant's assistance does not absolve the defendant of criminal liability. *People* v *Potter*, 5 Mich 1, 5 (1858). The request by the decedents does not provide justification or excuse. E.g., *State* v *Cobb*, 229 Kan 522; 625 P2d 1133 (1981); *State* v *Fuller*, 203 Neb 233; 278 NW2d 756 (1979); anno: *Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide*, 40 ALR4th 702, § 5, pp 709-710. The magistrate's decision to bind over the defendant for trial should be upheld.

II

The lead opinion invites the circuit court on remand to draw a distinction between acts of participation that are merely "the events leading up to" the deaths of the decedents and "*the* final overt act that causes death" that, as a matter of law, will constitute probable cause for the charge of murder. Such a "test" transfers the responsibility for the outcome from the shoulders of this Court to the trial court and effectively converts every criminal homicide accomplished by participation into assisting suicide.

It could be argued that this solution does no more than what the assisted suicide law does. But the assisted suicide law is still only a temporary measure, and the Legislature has never indicated that it would not follow the model of other states and continue to

apply the law of criminal homicide despite the existence of statutes specifically directed to suicide.

The lead opinion's "solution" is in fact an invitation to continue participation until the level of participation assumes a level of proof for bindover suggesting that the defendant intended to kill a decedent for impure reasons. In pragmatic terms, the force of the law is to discourage conduct on the margins. What the lead opinion would do in setting new margins is permit a new range of activity and thus increase the potential for abuse of the vulnerable by the active participant.

As the Canadian Supreme Court recently and aptly observed in upholding a blanket prohibition against assisted suicide:

> The basis for this refusal is twofold it seems—first, the active participation by one individual in the death of another is intrinsically morally and legally wrong, and secondly, there is no certainty that abuses can be prevented by anything less than a complete prohibition. [*Rodriguez* v *British Columbia*, 107 DLR 4th 342; 1993 Lexis/Canada 51 (1993).]

A

People v *Roberts*, 211 Mich 187, 178 NW 690 (1920), correctly held that the homicide statute had incorporated the co-mon-law definition of assisted suicide as murder. The question presented is whether we have the authority to modify that definition and, granting that we have the power to do so, whether we should. *People* v *Couch*, 436 Mich 414; 461 NW2d 683 (1990). The latter question involves the issue whether the judiciary can devise an acceptable formula advancing the autonomy of those who deem their lives not worthy to be lived, without jeopardizing the lives of those whose further

existence society might deem not worthy of protection. That the Court is unable to do so is illustrated by today's decision that alters the law of causation in all suicide settings, not just those of the terminally ill or acutely suffering.

As Justice Jackson observed in a famous dissent, a judicial decision has a force all its own. "The principle then lies about like a loaded weapon . . . . Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes." *Korematsu* v *United States*, 323 US 214, 246; 65 S Ct 193; 89 L Ed 194 (1944).

The fact that an active participant in the death of another risks jury determination that the circumstances are not so compelling as to benefit from their mercy-dispensing power tests the situation and the actions by the only repository of authority within the judicial reach. Whether death has been caused for good, bad, or mixed reasons, or whether the person is in fact presently incurable or suffering intolerable and unmanageable pain, and has a fixed and rational desire to die, are issues that should be addressed by a jury or the Legislature, not by this Court as a matter of law.

Today the Court purports to approve only a mild deviation from the common law by moving the line of protection the murder statute affords from participation to pulling the trigger. But the law that condemns such killings as murder has a substantially greater deterrent effect, imposing a substantially greater responsibility on those who would violate it than the penalty for assisted suicide.

While the Court's redefinition of causation is presumably correctable, the lead opinion would reduce the deterrent potential without any assurance that the line

it draws will not marginally increase the risk of death for those who would have a reason to live had society and the participant in their demise valued their continued existence.

The lead opinion recognizes that the state's interest in guarding against potential abuses does not require it to stand neutral. The state's interest in protecting the lives of those who wish to live under any circumstances also justifies the most severe sanction for those who would cause such deaths. The lead opinion nonetheless sends the message that it assesses the quality of particular human life and judges as a matter of law that it is less culpable to destroy some lives than others.[4] In a society that draws a line that dictates that it is better that many go free than that one innocent person should be convicted, something approaching the principles protecting against error that are extended to the criminally accused should be extended to the victims of those who are willing to participate in suicide and to cause death, as long as they do not pull the final trigger. Kamisar, *Some non-religious views against proposed "mercy-killing" legislation*, 42 Minn L R 969, 1041 (1958).

The lead opinion's distrust of the jury and its dislike for the severity of the punishment imposed by the law of criminal homicide has caused it to draw a line that crosses a dangerous threshold. The risk of irreversible mistake, however "minimal," should not be borne by those no longer able to protest — it should rest on those who assume the authority and wisdom to extinguish human life.

B

To the extent that this Court reduces culpability for those who actively participate in acts that produce

death, we do so at the risk of the most vulnerable members of our society — the elderly, the ill, the chronically depressed, those suffering from a panoply of stressful situations: adolescence, loss of employment, the death of a child or spouse, divorce, alcoholism, the abuse of other mind-altering substances, and the burden of social stigmatization.

The lead opinion's solution assumes the actor is a sufficient buffer between the patient and the family, that the actor knows enough about the disease to assure its terminal course and enough about the sanity of the deceased to evaluate the rationality of suicide. The lead opinion thus ignores the distinction between a voluntary act carried out if the victim is sane, and the inquiry into whether the victim's mental state is compromised by disease, depression, or medication.

C

The Model Penal Code recognizes the inherent difficulty of objective management of an assisted suicide law to separate proper from improper motivations of a participant. The code classifies purposely causing, that is, engaging in conduct "but for which the result in question would not have occurred," Model Penal Code, § 210.5, comment 4, p 98, suicide by force, duress, or deception as criminal homicide. Aiding or assisting another to commit suicide is a felony at the level of manslaughter if the defendant's conduct causes, that is, was a "significantly contributing factor" to a suicide or attempted suicide. *Id.*, comment 5, p 103. The same distinctions are drawn in statutory schemes. States that have enacted assisted suicide statutes continue to permit prosecutions for criminal homicides out of recognition that underinclusive line drawing by the judiciary may, as here, permit dangerously overinclusive activity.

In fact, as the excerpts from the cases cited by the lead opinion indicate, it has not aligned itself with other states. Thus, in *People* v *Cleaves*, 229 Cal App 3d 367, 375; 280 Cal Rptr 146 (1991), the court found that a defendant who held the decedent's back so the decedent could strangle himself was not merely a passive participant in a suicide, stating that the murder statute applies "where a person actively assists in performing the overt act resulting in death . . . ." Likewise, *State* v *Sexson*, 117 NM 113; 869 P2d 301 (NM App, 1994), does not support the lead opinion's revisionist view of causation. In *Sexson*, the court found that defendant could be charged with murder on evidence that he merely held a gun in place because "[t]hat action transcends merely providing the Victim a means to kill herself and becomes active participation in the death of another." *Id.*, 869 P2d 305.

The factual setting and issue decided in *In re Joseph G*, 34 Cal 3d 429; 194 Cal Rptr 163; 667 P2d 1176; 40 ALR4th 690 (1983), are markedly dissimilar from those in the present case. Unlike defendant Kevorkian, who was not a party to any similar agreement, but rather an aider in accomplishing the deaths of two other persons, the defendant in *Joseph G* was a participant in a mutual suicide pact, intending at the time of his actions to kill both himself and his partner.[5]

In finding that a defendant who simultaneously undertook completion of the agreed to suicides with his deceased partner by a single instrumentality could only be found guilty of assisting suicide, and not murder, the California court "decline[d] to ritualistically apply the active/passive distinction" between murder and suicide assistance employed by earlier precedent to the *unique* facts before it. *Id.* at 440.

The *Joseph G* court did analyze precedent regarding the distinction between murder and the statutory crime

of assisting suicide, but did not hold, as the lead opinion suggests, that a charge of murder against a suicide assistor is unavailable unless the assistor participated in the final overt act. Instead, the court concluded that "the key to distinguishing between the crimes of murder and of assisting suicide is the active or passive role of the defendant in the suicide. If the defendant merely furnishes the means, he is guilty of aiding a suicide; if he actively participates in the death of the suicide victim, he is guilty of murder." *Id.* at 436. The court made no clear distinction between where such passive assistance ends and active participation begins.[6]

Although these distinctions are irrelevant in this context because we did not have an assisted suicide statute at the time of the deaths of Ms. Wantz and Ms. Miller, the referenced discussion establishes that, in these states, participation in the overt acts causing death is chargeable as murder. Thus, the cases cited do not support the lead opinion's conclusion that if the defendant did not participate "in *the* act that . . . directly cause[s] death," slip op at 57, n 69, he cannot be bound over on a charge of murder.[7] Sexson did not pull the trigger, he held up the gun, and Cleaves did not strangle the decedent, he assisted the decedent in completing the act. Likewise, defendant Kevorkian did not pull the trigger for Ms. Miller, but he assisted Ms. Miller in completing the act. In Ms. Wantz's case, his involvement was even more direct. Defendant inserted the needle and Ms. Wantz sedated herself. When her hand dropped involuntarily, the trigger was pulled and the needle inserted by defendant was activated carrying potassium chloride in sufficient quantities to cause death.

III

Finally, the lead opinion finds that one who has only participated in a suicide but has not done the final act causing death may be prosecuted under the saving clause. MCL 750.505; MSA 28.773. The statute is applicable only when two conditions obtain: the conduct is not otherwise punishable by statute and the conduct was indictable at common law. However, at common law, one who does the deed, even through an innocent agent, is a principle in the first degree. Perkins & Boyce, Criminal Law (3d ed), p 737. If suicide is not criminal,[8] the lead opinion has attempted by judicial fiat to create a new crime of assisting suicide. Culpability for persons assisting in suicide at common law was based on participation as parties to the crime of suicide.[9] The saving clause furnishes no basis for the Court's creation of a new crime. The usurpation of legislative authority in the lead opinion's approach is evident if one considers the reach of its rationale. The lead opinion suggests an ability to exclude certain factual settings from the reach of the homicide statutes and then, as it were, find legislative authorization of a free-standing authority to recognize newly evolving crimes punishable under the saving clause. If such conduct were permissible, the Court could simply reorder the punishment for any felony by concluding that conduct falls outside a given statute but within the saving clause. Contrary to the lead opinion's conclusion, the saving clause is not a delegation of legislative authority to this Court to create new crimes. The Legislature intended to save only what had not otherwise been covered in 1846.

CONCLUSION

The lead opinion would hold that where one "only" plans and participates in a death the actor can claim

was "suicide," he may not be charged as a matter of law with criminal homicide. No jurisdiction in the history of this country has so held and for obvious reasons. We have no way of assuring that redefining the line that constitutes causation will distinguish between terminally ill or desperately suffering people and those who think they are, no way of deciding in advance that the act of suicide is that of a rational person who chose death with dignity or that of a severely depressed person who would not have chosen death had help been available. Most significantly, the lead opinion's unwillingness to allow a jury to dispense mercy by determining the degree of culpability for a result clearly intended and caused in fact by a defendant is a sea change in the fundamental value we have assigned to the preservation of human life as one of the last great faiths that unites us.

The question whether the definition of murder should be changed so as to exclude one who participates in all events leading up to the death, save for the final act, is a matter of compelling public interest, demanding a balancing of legitimate interests that this Court is institutionally unsuited to perform. Although the Legislature passed a temporary assisted suicide law that included participation, it has not indicated that it intends to redefine murder, and every jurisdiction that has adopted a specific law covering assisted suicide has permitted prosecution for murder where the participation goes "too far." No issue is more deserving of continued legislative debate and public study regarding whether, when, and how persons can maximize personal autonomy without running the risk of creating a societal quicksand for irreversible error.

The decision to stay our hand in this matter is not simply a matter of adhering to the rule of law.[10] It

reflects the wisdom in recognizing that if we choose not to intervene, we have left the pressure for change in this rapidly developing and exceedingly complex field in the forum where it is best addressed. To choose to intervene is to remove the pressure to decide that assisting suicide can be found by a jury to be murder, and to add the Court's imprimatur to the voices of those who argue for an expansive right to self-determination that would decriminalize assisted suicide.

As Professor Tribe observed in the context of constitutional principles regarding these issues:

> [T]he judiciary's silence regarding such constitutional principles probably reflects a concern that, once recognized, rights to die might be uncontaineble and might prove susceptible to grave abuse, more than it suggests that courts cannot be persuaded that self-determination and personhood may include a right to dictate the circumstances under which life is to be ended. In any event, whatever the reason for the absence in the courts of expansive notions about self-determination, the resulting deference to legislatures may prove wise in light of the complex character of the rights at stake and the significant potential that, without careful statutory guidelines and gradually evolved procedural controls, legalizing euthanasia, rather than respecting people, may endanger personhood. [Tribe, American Constitutional Law (2d ed), pp 1370-1371.]

The profound questions that must be debated and the regulatory decisions that must be made are uniquely suited for legislative resolution. There is no principled method by which the Court can amend the common-law definition of murder, included in the

statutes of this state. *People* v *Utter*, 217 Mich 74, 86; 185 NW 830 (1921).

> [I]t is proper, in fact the oath we took requires nothing less, to rely on the Legislature to devise, should it choose to do so, a means to avoid the harsh penalty that is imposed when assisting a suicide is treated as murder pursuant to a literal application of MCL 750.316; MSA 28.548. [*People* v *Kevorkian No 1*, 205 Mich App 180, 191; 517 NW2d 293 (1994).]

/s/ Patricia J. Boyle
/s/ Dorothy Comstock Riley

FOOTNOTES

1 Const 1963, art 4, § 24.

2 *Poe* v *Ullman*, 367 US 497, 542; 81 S Ct 1752; 6 L Ed 2d 989 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

3 MCL 750.505; MSA 28.773.

4 The line drawn today is a far less merciful one than recognizing that there is much that could and should be done for those who are truly suffering, or who, for a variety of reasons, have come to see themselves as irrelevant in this brave new world.

5 In addition, the court in *Joseph G* was concerned with the interpretation of a statutory proscription against assisting suicide, rather than the propriety of charging common-law murder as is present in the instant case.

6 We do not reach the question whether *People* v *Roberts*, *supra*, should be reconsidered insofar as it might apply to one who is absent when the means furnished is consumed by the deceased. *Roberts* is factually dissimilar from the instant cases. The question whether the acts in this case constituted a common-law crime not incorporated by our criminal statutes is likewise not before us. We note, however, that the Court in *Roberts* did not find it necessary to determine if suicide was a crime (although unpunishable) in Michigan. The Court's exclusive reliance on *Blackburn* v *State*, 23

Ohio 146 (1872), may have obscured the fact that, unlike the Michigan statutory scheme, the Ohio statutes did not contain a saving clause. See *State* v *Carney*, 69 NJL 478, 480; 55 A 44 (1903). The *Roberts* definition of murder correctly states the common law embodied in our homicide statutes.

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7 The lead opinion is willing, slip op, p 58, n 70, to recognize that one who negligently furnishes the means by which another commits suicide could be found guilty of manslaughter. Thus, one who is only criminally careless and does not participate at all may be found guilty of a fifteenyear felony, while one who is present and participates in the events leading up to the act that directly caused death with the intent to cause death can only be charged with assisted suicide, punishable by a maximum penalty of five years. Moreover, since an act of suicide is innocent, it would follow that one who attempts and fails but kills others in the process may not be charged with any offense.

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8 Slip op at 58, n 71.

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9 See, generally, *id.* at 735-751 (describing the common-law distinctions between principals and accessories), pp 756-757, (applying the distinctions in suicide cases).

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10 Const 1963, art 3, § 7. "The common law and the statute law now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."

OPINION CONCURRING IN PART AND DISSENTING IN PART

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, Cross-Appellee, v JACK KEVORKIAN, Defendant-Appellee, Cross-Appellant — No. 99591; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JACK KEVORKIAN, Defendant-Appellant — No. 99674; TERESA HOBBINS, MARIE DEFORD, KENNETH A. SHAPIRO, KENNETH WEINBERGER, WILLIAM DRAKE, ELLIOT D. LUBY, NORMAN BOLTON, KENNETH TUCKER, KATHRYN UPTON, and B. ELLIOT GRYSON, Plaintiffs-Appellees, v ATTORNEY GENERAL OF MICHIGAN, Defendant-Appellant — No. 99752; TERESA HOBBINS, MARIE DEFORD, KENNETH A. SHAPIRO, KENNETH WEINBERGER, WILLIAM DRAKE, ELLIOT D. LUBY, NORMAN BOLTON, KENNETH TUCKER, KATHRYN UPTON, and B. ELLIOT GRYSON, Plaintiffs-Appellants, v ATTORNEY GENERAL OF MICHIGAN, Defendant-Appellee — No. 99758; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, Defendant-Appellee — No. 99759)

BEFORE THE ENTIRE BENCH

LEVIN, J. (*concurring in part and dissenting in part*).

I agree with the lead opinion that § 7 of 1993 PA 3,[1] enacting that a person, who provides the "physical means" or "participates in a physical act" by which another person attempts or commits suicide, is guilty of criminal assistance to suicide,[2] does not violate the Title-Object Clause of the Michigan Constitution.[3]

I further agree with the lead opinion that the common-law offense of murder should be redefined to preclude conviction for murder on evidence that the accused was merely involved in the events leading up to the death, such as providing the means, and that in such a case the proper charge is assisted suicide under

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[Printer's Note]: **Footnotes 1-31 are reproduced, *infra*, beginning on page A-87.**

the saving clause of the Penal Code providing that it is a five-year felony to commit a common-law offense for which no provision is made by statute.[4]

I also agree that § 7 of act 3 does not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution[5] insofar as it bars assisting suicide by a physically healthy but mentally disturbed or incompetent person.[6]

I would hold, however, that § 7 of act 3 violates the Due Process Clause insofar as it bars a competent, terminally ill person facing imminent, agonizing death from obtaining medical assistance to commit suicide.

I would accordingly direct, in the three criminal cases (numbers 99591, 99674, and 99759), that if the circuit court determines on remand that the evidence produced at the preliminary examinations shows that the persons who committed suicide were competent, terminally ill, facing an imminent, agonizing death, the motion to quash should be granted with regard to assisted suicide as well as murder, and, if the preliminary examination records are inadequate for that purpose, the matters should be remanded by the circuit court for a further preliminary examination to determine whether the persons who committed suicide were competent, terminally ill, and facing an imminent, agonizing death.

I

1993 PA 3 does not violate the Title-Object Clause of the Michigan Constitution because

- Act 3 embraces but one object, namely, issues related to death and dying, including assistance of suicide, and
- Act 3, in contrast with 1992 PA 270, was not altered or amended on its passage through either house.

II

Dr. Kevorkian is not a murderer. The evidence in the instant *People* v *Kevorkian* cases, in contrast with the record in *People* v *Roberts*, 211 Mich 187; 178 NW 690 (1920), which depended substantially on the possibly self-serving testimony of the defendant, who had pleaded guilty, establishes that Dr. Kevorkian did no more than provide the physical means by which the decedents took their own lives. That evidence establishes no more than criminal assistance of suicide or a common-law assisted suicide offense for which no provision is made by statute.[7]

I agree with the lead opinion that *Roberts* should be overruled insofar as it can be read as holding that a person who does no more than assist another in committing suicide has acted with the requisite malice to establish that element of the crime of murder.[8]

Because the evidence adduced in the murder prosecutions showed no more than criminal assistance to suicide or such a common-law assisted suicide offense, I see no need for a remand to determine whether Dr. Kevorkian should be bound over on a charge of murder. I join in part VI of the lead opinion to join in overruling *Roberts* to the extent that it can be read to support the view that the common-law definition of murder encompasses intentionally providing the means by which a person commits suicide.[9]

III

The Attorney General and the prosecutors contend that in no circumstance does a person have a liberty interest under the Due Process Clause in obtaining medical assistance to commit suicide. Dr. Kevorkian contends that any terminally ill person has such a liberty interest. I do not agree with either of those absolute positions.

I have signed the opinion of a colleague[10] that would recognize a right in some circumstances to physician-assisted suicide because I agree with him that a person who is terminally ill may have a liberty interest in obtaining a physician's assistance to commit suicide, and that § 7 of act 3 may be violative of the Due Process Clause as applied to a particular terminally ill person.

Absent legislation providing a means, with legislatively prescribed safeguards, by which a terminally ill person may obtain such medical assistance, I would hold that a terminally ill person may apply to the circuit court for an order declaring entitlement to seek medical assistance, and that § 7 of act 3 is violative of the Due Process Clause as applied to that person.

The developing law[11] concerning the withholding of medical treatment[12] would assist a circuit judge in deciding whether it is appropriate under all the circumstances to conclude that the person is entitled to seek medical assistance to commit suicide. Such a case should, of course, be expedited, and preliminary phases of such litigation could precede the time when the terminally ill person actually faces imminent, agonizing death.

The record in *Hobbins* v *Attorney General* does not establish that the persons alleging terminal illness in that litigation have now reached the threshold where it would be appropriate to conclude that they are entitled to seek medical assistance to commit suicide, nor do they claim that they have an immediate desire to do so. They should be allowed to commence an action at any time to establish a record so that if and when they approach the threshold where it is appropriate to conclude that they are entitled to medical assistance to commit suicide, the preliminary phases of such litiga-

tion will have been concluded and the circuit court can, on a proper showing, expeditiously enter an order providing the relief that they seek so that they can die, if they choose, less convulsively, less painfully, and with as much dignity as may be possible.

IV

I turn to the meritorious question, whether § 7 of act 3 violates the Due Process Clause.

The lead opinion states that "the threshold question in this case is whether the [Due Process] Clause encompasses a fundamental right to commit suicide and, if so, whether it includes a right to assistance."[13]

By framing the question in this manner, the lead opinion foreordains the answer.

There is a long history of laws prohibiting suicide. The state has the power, indeed the obligation, to protect life. But laws prohibiting suicide and assisted suicide evolved to address situations different from those here at issue. Those laws assume that persons seeking to terminate their lives are emotionally disturbed or mentally ill. This is so in the vast majority of cases.

The real issue is not whether the state can generally prohibit suicide. The real issue is whether the state may deny a competent, terminally ill person, facing imminent, agonizing death, medical assistance to commit suicide.

I agree with the lead opinion that assisted suicide can be distinguished from other conduct protected by the Due Process Clause, such as abortion and the withdrawal of life-sustaining medical treatment. The absence of controlling precedent precisely addressing the issue does not, however, end the inquiry, as the lead opinion presupposes when it states, "[w]e disagree . . . that either

Cruzan or *Casey preordains* that the Supreme Court would find that any persons, including the terminally ill, have a liberty interest in suicide that is protected by the Fourteenth Amendment."[14] (Emphasis added.)

If the issue were preordained, these cases would not be so troubling. The real issue facing the Court is not whether suicide or assisting suicide can be proscribed by law, but whether the Due Process Clause bars a state from depriving a competent, terminally ill person, facing imminent death, and increasing agony, from obtaining medical assistance to avoid suffering such a bitter end of life.

The lead opinion distinguishes at length the instant cases from *Cruzan* v *Director, Missouri Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990), and *Planned Parenthood of Southeastern Pennsylvania v Casey*, ___ US ___; 112 S Ct 2791; 120 L Ed 2d 674 (1992), and stresses the obvious: there is a long history of laws outlawing suicide.

Abortion and withdrawal of life-sustaining measures are indeed different from assisted suicide. Nevertheless, a reasoned application of the principles stated in *Casey* and *Cruzan* persuades me that state law restrictions on a person's ability to end his life implicates the interest in personal liberty. Whether a competent, terminally ill person has a right to medical assistance to commit suicide cannot be decided without balancing the state's interest against the person's interest. I conclude that the United States Supreme Court, as presently composed, if constrained to decide the question, would hold that the person's interest outweighs the state's interest when the person is competent, terminally ill and facing an imminent and agonizing death.

I thus so conclude, not from any explicit command of precedent, but by applying the approach suggested by

the United States Supreme Court in *Casey*, "reasoned judgment"[15] to the imperfect analogies of *Casey* and *Cruzan*.[16]

V

The lead opinion dismisses *Casey*, arguing that it was decided on the basis of stare decisis, rather than the merits, and that abortion is sui generis. *Casey*, however, reaffirmed the doctrinal support for earlier abortion rights decisions of the United States Supreme Court, stating:

> [T]he reservations any of us may have in reaffirming the central holding of *Roe* are *outweighed by the explication of individual liberty* we have given combined with the force of *stare decisis*." [*Id.*, 112 S Ct 2808 (emphasis added).]

The *Casey* plurality clarified the analytic method for deciding substantive due process issues, and said:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: *reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.* That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. [*Id.*, 112 S Ct 2806 (opinion of O'Connor, Kennedy, and Souter, JJ).] (Emphasis added.)

Although the lead opinion would limit the inquiry solely to historical practices and precedent, *Casey* calls on us to engage in a more thoughtful, less formulaic approach.[17]

VI

Another line of cases, beginning with *In re Quinlan*, 70 NJ 10; 355 A2d 647 (1976), and, more recently *Cruzan*, *supra*, addresses the question whether life-sustaining medical treatment may be withdrawn from an incompetent person. *Cruzan* said that recognition of a right to refuse life-sustaining support was implicit in the Court's earlier decisions construing the Due Process Clause. The Court on that basis assumed that "the United States Constitution would grant a *competent* person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.* at 279.[18]

The Court said that competing interests were involved, especially where, as in *Cruzan*,[19] the life of an incompetent person was involved.[20] The Court ruled in conclusion that a Missouri statute requiring that there be clear and convincing evidence of the incompetent person's intent before authorizing the withdrawal of life-sustaining treatment struck a constitutionally permissible balance between the competing interests.[21]

The lead opinion contends that withdrawal of life support can be distinguished from assisted suicide. I generally agree.

A rule allowing a person to have his respirator disconnected, but to take no other steps to end his life, condemns him to choke to death on his own sputum. Similarly, if the law bars a person who can only take nourishment through a feeding tube from taking steps in addition to ordering the tube removed to end his life, he is required to suffer death by starvation and dehydration. Barring such persons from taking other steps to end their lives would, I think, constitute an undue burden on the right implicitly recognized in *Cruzan*.[22] *Cruzan* should not be read as limiting a

person to a half step when that would result in greater suffering.

The legitimate concerns about involuntary euthanasia apply with at least as much force to the withdrawal of life support where the person is incompetent, yet the United States Supreme Court in *Cruzan* held that a state statute permitting the withdrawal of life support on proof of the incompetent's wishes by clear and convincing evidence was consistent with due process.

VII

The *Casey* plurality resolved the conflict between the state's interest in the life of the fetus and the woman's interest in bodily integrity and self-determination by drawing a line at fetal viability.[23] Before viability, the state may not place an "undue burden" on the woman's right to an abortion.[24]

In Cruzan, the Court struck a balance between the state's interest in life and preventing euthanasia, and the incompetent person's interest in being free of unwelcome bodily intrusions. The Court found that a "clear and convincing" evidentiary standard provided a permissible balance of the competing interests.[25]

In the suicide context, legitimate state interests generally outweigh a person's interest in ending his life. The vast majority of suicides are "irrational" efforts by the depressed or mentally disturbed. Society can reasonably assume that a person's mental problems have clouded his perception. Where an otherwise healthy person is depressed or mentally disturbed, the personal liberty interest is weak, and the state has a strong interest in protecting the person's interests in life.

In contrast, where the person involved is competent, terminally ill, and facing imminent, agonizing death, the

interest of the state in preserving life is weak, and the interest of the terminally ill person in ending suffering is strong.

The state asserts two interests.[26] First, the state's general interest in preserving life.[27] In most situations where a person might seek to commit suicide, the person, even if handicapped or emotionally disturbed, has years of life remaining for the state to protect. That possibility has been largely foreclosed for a terminally ill person. The choice that remains is not between life and death, but over the terms of death.

The principal argument against assisted suicide is the second interest asserted by the state: assuring that persons who desire to live are not coerced into committing suicide. While this is clearly a concern of great importance, adequate procedures can and have been developed to assure that a terminally ill person's choice to end life is not coerced.[28]

Restrictions on medical assistance to commit suicide for the terminally ill should be evaluated according to the undue burden standard enunciated in *Casey*.[29] The undue burden standard permits the state to regulate the process of medically assisted suicide to assure that the person truly (a) is terminally ill, (b) is competent, (c) is suffering agonizing pain, (d) faces imminent death, (e) desires to commit suicide, and (f) needs or desires help to do so.

The lead opinion contends that "[n]o clear definition of 'terminal illness' is medically or legally possible, since only in hindsight is it known with certainty when someone is going to die."[30]

There is to be sure difficulty in defining "terminal illness." That does not justify avoiding the issue.[31]

With appropriate regulation and safeguards, the state may account for the differences in medical opinion in determining whether a competent, terminally ill person faces an imminent agonizing death.

/s/ Charles L. Levin
/s/ Conrad L. Mallett, Jr.

FOOTNOTES

1 MCL 752.1021 *et seq.*; MSA 28.547(121) *et seq.*

2 (1) A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal assistance to suicide, a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both:

(a) Provides the physical means by which the other person attempts or commits suicide.

(b) Participates in a physical act by which the other person attempts or commits suicide.

(2) Subsection (1) shall not apply to withholding or withdrawing medical treatment.

(3) Subsection (1) does not apply to prescribing, dispensing, or administering medications or procedures if the intent is to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death.

(4) This section shall take effect February 25, 1993.

(5) This section is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4. [MCL 752.1027; MSA 28.547(127).]

3 The Michigan Constitution provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title. [Const 1963, art 4, § 24.]

4 Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly

made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court. [MCL 750.505; MSA 28.773.]

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5 The Fourteenth Amendment provides in part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

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6 The memorandum opinion states:

> 2) The United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in committing suicide. (Cavanagh, C.J., and Brickley, Boyle, Riley, and Griffin, JJ.)

I join in that statement insofar as such penalties are imposed on one who assists a physically healthy but mentally disturbed or incompetent person to commit suicide, but do not join insofar as such penalties are imposed for providing medical assistance to commit suicide to a competent, terminally ill person facing an imminent agonizing death.

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7 See n 5 and accompanying text, and the lead opinion, slip op, p 58.

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8 A person who purposely causes another to commit suicide by force, duress or deception may be prosecuted for murder. See ALA, Model Penal Code, § 210.5(1) pp 91 *et seq.*

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9 Slip op, p 57.

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10 See opinion of Mallett, J., concurring in part and dissenting in part.

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11 *Guidelines for State Court Decision Making In LifeSustaining Medical Treatment*, National Center for State Courts (2d ed) (1992).

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12 See subsection 2 of § 7 of act 3, n 2 *supra*, which provides that subsection 1 of § 7 of act 3 "shall not apply to withholding or withdrawing medical treatment."

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13 Slip op, p 22.

The lead opinion similarly states:

> All of the theories, of course, assume a fundamental liberty interest in suicide itself. [Slip op, pp 27-28.]

The lead opinion reasons in an accompanying footnote:

> An attempt to find a liberty interest in assisted suicide independent of a liberty interest in suicide itself cannot succeed. If the Due Process Clause does not encompass a fundamental right to end one's life, it cannot encompass a right to assistance in ending one's life. [Slip op, p 28, n 35.] See also second paragraph of n 47 on page 37.

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14 Slip op, p 30.

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15 *Casey*, *supra*, 112 S Ct 2806, opinion of O'Connor, Kennedy, and Souter.

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16 In *Cruzan*, the Court said:

> Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition. [497 US 279.]

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17 The *Casey* plurality reaffirmed the following view of the Due Process Clause:

> "Due process has not been reduced to any formula, its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . .
>
> The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing." [*Id.*, 112 S Ct 2806 (quoting *Poe* v *Ullman*, 367 US 497, 542, 81 S Ct 1752; 6 L Ed 2d 989 (1961) (Harlan, J. dissenting from dismissal on jurisdictional grounds).]

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18 As the lead opinion observes, the United States Supreme Court premised this right on the right to refuse medical treatment. Slip op, p 24, n 29. This right was derived as a corollary to the common-law notion of informed consent. Cruzan, *supra* at 269-272. In addition, this right was framed in terms of a protected "liberty" interest, rather than under the right to privacy. *Id.* at 279, n 7.

19 And in *Quinlan.*

20 *Id.* at 280-281.

21 *Id.* at 283.

22 See part VII.

23 *Id.*, 112 S Ct 2817.

24 *Id.*, 112 S Ct 2820.

The plurality stated that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*, 112 S Ct 2820.

25 *Id.*, at 283.

26 The state and amici assert other interests, such as preserving the integrity of the medical profession and protecting friends and family of the suicide from emotional harm as balancing against the liberty interest recognized here. Whether these interests weigh in favor or against permitting a terminally ill person to end his own life depends on the particular circumstances of a given case. It is by no means clear that these interests would always be in opposition to the terminally ill person's liberty interest.

27 It has been said that it is questionable why such an interest is legitimate, "completely abstracted from the interest of the person living that life . . . ." *Cruzan, supra* at 313. (Brennan, J., dissenting). But the *Cruzan* majority decided that government "may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . ." *Id.* at 282.

28 See n 10.

29 See *Casey*, 112 S Ct 2820.

30 Slip op, p 27, n 34.

31 As stated in *Casey:*

> Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a Justification. But courts may not. We must justify the lines we draw. And there is no line other than via-

bility which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, . . . but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. [*Id.*, 112 S Ct 2817.]

OPINION CONCURRING IN PART AND DISSENTING IN PART

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, Cross-Appellee, v JACK KEVORKIAN, Defendant-Appellee, Cross-Appellant — No. 99591; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JACK KEVORKIAN, Defendant-Appellant — No. 99674; TERESA HOBBINS, MARIE DeFORD, KENNETH A. SHAPIRO, KENNETH WEINBERGER, WILLIAM DRAKE, ELLIOT D. LUBY, NORMAN BOLTON, KENNETH TUCKER, KATHRYN UPTON, and B. ELLIOT GRYSON, Plaintiffs-Appellees, v ATTORNEY GENERAL OF MICHIGAN, Defendant-Appellant — No. 99752; TERESA HOBBINS, MARIE DEFORD, KENNETH A. SHAPIRO, KENNETH WEINBERGER, WILLIAM DRAKE, ELLIOT D. LUBY, NORMAN BOLTON, KENNETH TUCKER, KATHRYN UPTON, and B. ELLIOT GRYSON, Plaintiffs-Appellants, v ATTORNEY GENERAL OF MICHIGAN, Defendant-Appellee — No. 99758; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, Defendant-Appellee — No. 99759)

MALLETT, J. (*concurring in part and dissenting in part*).

Because the lead opinion would find that there is no constitutional right, in any situation, to hasten one's death through physician-prescribed medications, I dissent. I agree with part IV of the lead opinion that the assisted suicide act does not violate the Title-Object Clause of the Michigan Constitution. I also agree with part VI of the lead opinion's finding, modifying the common-law definition of murder and recognizing assisting suicide as a common-law offense, and further

agree that if the required elements of assisting suicide are presented to an examining magistrate under the saving clause, MCL 750.505; MSA 28.773, the defendant shall be bound over for criminal prosecution. I recognize that under part VI, the defendant in this case may possibly be prosecuted for murder. Confronted with the record presented to this Court, I would find it hard to believe that an examining magistrate could determine that the defendant here was more than merely involved in the events leading up to the commission of the final overt act and thus chargeable or prosecutable for any crime other than assisting suicide. Central to the lead opinion's position are the statements made and the legal conclusions reached in part V. The following pages contain the reasons for my dissent.

There are strong arguments based on moral principles on both sides of this issue, and this Court should be wary of accepting arguments based solely on moral principles. As the United States Supreme Court stated in *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, ___ US ___, ___; 112 S Ct 2791, 2806; 120 L Ed 2d 679 (1992), "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." Defining liberty, therefore, cannot involve a morality play by any group or by a general disapproval by the majority of this Court. The liberty to end one's suffering during a terminal illness exists as shown by the decisions in *Cruzan* v *Director, Missouri Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990), *In re Quinlan*, 70 NJ 10; 355 A2d 647 (1976), cert den sub nom *Garger* v *New Jersey*, 429 US 922 (1976), and *Compassion in Dying* v *Washington*, 840 F Supp 1454 (WD Wash, 1994). It exists without the approval of a significant constituency and is no less deserving of recognition than is abortion. Furthermore, I agree with the court in *Compassion in Dying*, that, in some respects, the right to physician-

assisted suicide may be easier to recognize because there is no competing life interest assertable by the state.

I

THE FOURTEENTH AMENDMENT

The rights conferred under the substantive portion of the Due Process Clause have been developing for over one hundred years. *Mugler* v *Kansas*, 123 US 623; 8 S Ct 273; 31 L Ed 205 (1887). As pointed out in *Planned Parenthood* v *Casey*, 112 S Ct 2804, the Due Process Clause contains "a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them,'" quoting *Daniels* v *Williams*, 474 US 327, 331; 106 S Ct 662; 88 LEd 2d 662 (1986).[1]

The constitutional claim presented here falls squarely within the Due Process Clause of the Fourteenth Amendment that maintains that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." As in the abortion cases, the governing word in this case is "liberty."

The joint opinion of Justices O'Connor, Kennedy, and Souter, in reaffirming a woman's right to receive an abortion, recognized that such cases are at "an intersection of two lines of decisions . . . ." *Casey*, 112 S Ct 2810. These cases may be viewed as either "an exemplar of *Griswold* liberty" or examples of "personal autonomy and bodily integrity . . . ." *Id.*, 112 S Ct 2810, citing *Cruzan*, *supra* at 278.[2] Whether physician-assisted suicide is characterized as a liberty right or a privacy right, the proper constitutional analysis is found in *Casey* and the right to die cases.

[Printer's Note]: **Footnotes 1-13 are reproduced, *infra*, beginning on page A-105.**

The lead opinion and the various amici curiæ in this case contend that liberty interests exist only where conduct is "'deeply rooted in this Nation's history and tradition'" or "'implicit in the concept of order liberty' . . . ." See *Bowers* v *Hardwick*, 478 US 186, 191-192; 106 S Ct 2841; 92 L Ed 2d 140 (1986), quoting *Palko* v *Connecticut*, 302 US 319, 325-326; 58 S Ct 149; 82 L Ed 288 (1937), and *Moore* v *East Cleveland Ohio*, 431 US 494, 503; 97 S Ct 1932; 52 L Ed 2d 531 (1977). They argue that because there is a common background making suicide and assisted suicide crimes, physician-assisted suicide cannot be a fundamental right. They also argue that such a right cannot be found anywhere in the constitution or its amendments. However, to recognize only fundamental rights according to such a test is unsuitable for the vast and fast-moving progressions of the modern world. Earlier laws or traditions are not the "source" of liberty or privacy interests. If this were so, our nation's Supreme Court would have been unable to recognize the rights that many of us now understand to be inherent in our very being.[3] As Justice Stevens stated in *Meachum* v *Fano*, 427 US 215, 220; 96 S Ct 2532; 49 L Ed 2d 451 (1976):

> [N]either the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. *But it is not the source of liberty, and surely not the exclusive source.* [Emphasis added.]

Following the lead opinion's logic to its conclusion, fundamental rights would only arise if backed by a significant constituency. "'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy. . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections . . . .'" Tribe, Constitutional Law (2d ed), p 1351, quoting *West Virginia Bd of Ed* v *Barnette*, 319 US 624, 638; 63 S Ct 1178; 87 L Ed 1628 (1943). Moreover, if the historical analysis test is appropriate, then the holding in *Roe* v *Wade* would be nothing more than an exception to the rule.[4]

A

The Right to Die

This Court should not demand that plaintiffs establish an historical right to self determine the quality of life that a terminally ill person must endure.

The lead opinion suggests that because the *Cruzan* Court merely "assumed" for the purposes of that case that a person has a constitutional right to refuse lifesustaining treatment such a right my not exist. Yet if this Court was squarely presented with that issue, it is doubtful that it would rule contrary to established precedent of this state and others.[5]

Even applying the "concept of ordered liberty" analysis espoused by the lead opinion, the right to refuse lifesustaining treatment can be recognized. In *Washington* v *Harper*, *supra*, the United States Supreme Court found that a competent person, even an inmate who suffers from psychotic episodes, has a due process liberty interest to be free from the unwanted administration of antipsychotic medications.[6] Further, in the seminal case, *In re Quinlan*, *supra* at 39, the New Jersey Supreme Court explicitly recognized such a right:

> We have no doubt, in these unhappy circumstances, that if Karen were herself miraculously lucid for an interval (not altering the existing prognosis of the condition to which she would soon return) and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the life-support apparatus, even if it meant the prospect of natural death.
>
> * * *
>
> We have no hesitancy in deciding . . . that no external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life.

Both *Harper* and *Quinlan*, establish that a competent person has a fundamental right to refuse unwanted medical treatment. But more importantly, *Quinlan* and its progeny establish that a person has a right to determine whether to continue suffering when faced with an inevitable death and that the state may not compel unwanted lifesaving treatment.

Moreover, other jurisdictions have recognized that the state's interest in preserving life includes the duty to protect the right of a person not to die in a demeaning or degrading manner.[7] To recognize the right asserted here is simply a logical extension of the law.[8] As Justice O'Connor stated in *Cruzan*, *supra* at 289: "Requiring a competent adult to endure such procedures against her will burdens the patient' s liberty, dignity, and freedom to determine the course of her own treatment."

B

Planned Parenthood v *Casey*

In *Planned Parenthood* v *Casey*, the United States Supreme Court reviewed the constitutionality of the

Pennsylvania Abortion Control Act and whether its provisions constituted an undue burden on a woman's right to receive an abortion. For our purposes, the most instructive aspect of *Casey* was its reaffirmance of the basic tenets of *Roe* v *Wade* and a woman's fundamental right to receive an abortion.[9]

The opinion in *Casey* recognized that not all the substantive due process rights were identifiable at the time of the drafting of either the Bill of Rights or the Fourteenth Amendment. The framers of the constitution were also aware of this fact and understood that liberty could not be summarized in a single document, no matter how extensive. Justice Harlan's assertion in *Poe* v *Ullman* illustrates this principle best:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. *This 'liberty' is not a series of isolated points* pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. *It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints*, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgments." [*Casey*, 112 S Ct 2805, quoting *Poe* v *Ullman*, 367 US 497, 543; 81 S Ct 1752; 6 L Ed 2d 989 (1961) (Harlan, J., dissenting) (emphasis added).]

Thus, determining the existence of a liberty right involves a textual examination of the constitution, an

inward examination of a jurist's beliefs, and an analysis of public inclinations.

Justice O'Connor maintained:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. . . . "*Due process has not been reduced to any formula . . .*" [*Casey*, 112 S Ct 2806 (emphasis added).]

Even without a formulaic approach, reasoned judgment coupled with guidance from the following language of *Casey* provides some insight regarding the existence of the right asserted here:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence*, of meaning, of the universe, and of the mystery of human life. [*Id.*, 112 S Ct 2807 (emphasis added).]

In the ordinary course of existence, some decisions remain so personal in nature that society is not in a position to make judgments about their appropriateness. It is difficult to imagine a more personal or intimate choice than determining the nature or extent of one's suffering during a terminal illness. A person's con-

science, coupled with the advice of an informed and personally chosen physician, is the appropriate decision-making method.

Therefore, under the *Casey* "undue burden" analysis, I believe that the statute is facially invalid because it prohibits *all* physician-assisted suicide. As established in the right to die cases, a person has the right to determine the extent of his suffering when faced with an inevitable death. A complete ban on physician-assisted suicide represents an "undue burden" on the right of the terminally ill to end their suffering through physician-prescribed medications. As in Casey, an infringement of a fundamental right by the state that completely bars the exercise of that right cannot pass constitutional muster.[10]

Dr. Kevorkian asks this Court to find that there is a constitutional right for a suffering person to commit suicide with the assistance of a physician. However, I do not believe that people can always make competent decisions regarding their fate while suffering because too often there are circumstances in which such decisions would be later regarded as mistakes.

Plaintiffs ask this Court to recognize that a terminally ill person has a fundamental right to hasten an inevitable death. To the extent that the plaintiff asks this Court to recognize that a terminally ill person has an absolute right to make a choice to hasten an inevitable death, I believe this swings the pendulum too far. Instead, I would conclude that a terminally ill person has such a right only if the person has made a competent decision and is suffering from great pain.[11] Because plaintiffs are in a position to meet such a requirement, the Court ought not allow the prospect of reversal by the United States Supreme Court to inhibit the analysis of the very real constitutional claims pre-

sented by the plaintiffs. Beyond this criteria, I would hold that the state may assert its interest to preserve life as well as other established interests. Therefore, because the statute completely prohibits physician-assisted suicide, I believe that it is facially invalid.

This, of course, is not to say that the state does not have a readily identifiable interest in this area. The state has a legitimate interest in the preservation of the lives of its citizenry. However, the interests are not all-encompassing interests that would allow a blanket ban on physician-assisted suicide. "The Constitution imposes on this Court the obligation to 'examine carefully . . . the extent to which [the legitimate government interests advanced] are served by the challenged regulation.'" *Cruzan* at 303 (Brennan, J., dissenting, quoting *Moore* v *East Cleveland*, *supra* at 499). The interest in the preservation of life that is advanced by the state in the present case is not served by preserving the life of a person who will inevitably die and is suffering intolerable pain.

II.
THE STATE'S INTEREST

While it is arguable that each of us possesses the right to commit suicide because suicide is no longer criminally punishable, such a right, if it exists, is not absolute when a third party is involved. indeed, protecting the rights and interests of third parties underpins both our constitutional doctrine and criminal laws. Accordingly, I do not embrace the suggestion that because a person may have the right to commit suicide, he also has an unconditional constitutional right to physician-assisted suicide. Rather, the right to physician-assisted suicide must be balanced against the countervailing interests of the state and society.

There are four main interests in this area that may be asserted by the state: (1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) the maintenance of the ethical integrity of the medical profession. *In re Rosebush*, 195 Mich App 675, 681; 491 NW2d 633 (1992); *In re Conroy*, 98 NJ 321; 486 A2d 1209 (1985); *Donaldson* v *Lundgren*, 2 Cal App 4th 1614, 1620; 4 Cal Rptr 2d 59 (1992); *Cruzan* at 269-271. See also anno: *Judicial Power to order discontinuance of life-sustaining treatment*, 48 ALR4th 67. These authorities have uniformly maintained that a "'state's interest in the preservation of life has been held to be insufficient to outweigh the individual right where the life which would be preserved would be one in a merely vegetative state or one enduring only a prolonged process of dying . . . .'" *Rosebush* at 681, n 2. Similarly, there does not exist a sufficiently compelling justification for the infringement of the right of a competent, terminally ill person suffering from great pain to hasten death through physician-prescribed medications.

As a person's illness progresses to the point of facing an inevitable death while suffering great pain, the state cannot put forth a sufficient rationale to completely proscribe physician-assisted suicide. In *Brophy* v *New England Sinai Hosp*, 398 Mass 417, 433; 497 NE2d 626 (1986), the Massachusetts Supreme Judicial Court balanced the state's interest in the preservation of human life against the right of self-determination and individual autonomy. The court noted that the state's interest ordinarily involves the prolongation of human life and that that interest is "very high when 'human life [can] be saved where the affliction is curable.'" Quoting *Superintendent of Belchertown State School* v *Saikewicz*, 373 Mass 728, 742; 370 NE2d 417 (1977). However, the court further noted that this interest diminishes as the prognosis for recovery wanes. *Id.*, 398 Mass 433. Thus, when

a person is suffering from a terminal disease, the state should avoid subjective judgments concerning the quality of that person's life.[12]

The state may also require that such decisions be made competently.[13] Such a requirement has been fashioned by previous courts as well. In *Application of President & Directors of Georgetown College, Inc*, 118 US App DC 80; 331 F2d 1000 (1964), the court denied the right of patients to refuse life-saving treatment for themselves in circumstances strongly suggesting that they lack the time or the capacity for reflection on the matter, so that the course least likely to do irreversible harm was an insistence on proceeding with treatment.

Patients have been denied the right to refuse life-sustaining medical treatment where they did not have the capacity or an adequate opportunity to reflect on the finality of the decision. See, e.g., *Osgood* v *District of Columbia*, 567 F Supp 1026 (D DC, 1983). Additionally, the *Quinlan* court suggested that a person in extreme shock or pain is incapable of making a truly informed decision. 70 NJ 39, citing *John F Kennedy Memorial Hosp* v *Heston*, 58 NJ 576; 279 A2d 670 (1971).

Dr. Kevorkian's actions are within the scope of the state's protected interests. To the extent that a country sanctions the assisted suicide of the suffering, it does so at the risk of harm to its most vulnerable of citizens: e.g., the elderly and the clinically depressed.

Furthermore, extending the right to any suffering person making a rational decision almost begs the question. It has been widely acknowledged that most individuals who attempt suicide are suffering from depression, hopelessness, or lack of social interaction. Often such attempts are merely "cries for help." There are also socioeconomic pressures on individuals that

makes them consider suicide as a means of relief. Circumstances such as grief, prejudice, oppression, or teenage stress are often the reasons cited by people attempting suicide. Marzen, *Suicide: A constitutional right?*, 24 Dug L R 1 (1985).

Therefore, the state has a right to legislate in this area. However, the state's interests diminish as death nears for a terminally ill person; the interests are no longer sufficient to outweigh an individual's right to self-determination. Such an outcome would be consistent with *Compassion in Dying*, *supra*, in which the court recognized the right of mentally competent, terminally ill adults to knowingly and voluntarily hasten their deaths.

III.
CONCLUSION

The statute at issue should be deemed facially invalid because it bans all assisted suicides. A terminally ill individual who is suffering from great pain and who has made a competent decision should have a constitutional due process right to hasten his death. Because plaintiffs are in a position to now make a choice that I believe should survive any challenge from the state, I would hold that the statute represents an undue burden on that right.

The assumption that the recognition of this right would be problematic in its administration is not an appropriate consideration when determining the existence of a fundamental right. Indeed, constitutional litigation often creates the necessity to draw abstract lines that in practice are not easily workable. Nevertheless, the recognition of fundamental rights requires choices in these areas that are not readily ascribable to any particular administrative device.

We need only look to the development of the living will as an example of guidelines in the death and dying area that work effectively and remain constitutional. Pursuant to MCL 700.496; MSA 27.5496, a competent person already has the right to document the desire to refuse lifesaving medical treatment. While such documentation provides us with the right to refuse life-sustaining treatment, our laws currently do not permit us to choose to end our suffering as we near death through physician-prescribed medications. If we were allowed such an opportunity, our own reasoned judgment would prevail in each case.

There is no adequate distinction between the right of a terminally ill person to refuse unwanted medical treatment and the right to physician-assisted suicide. There is no sense in disallowing the competent choice to have a physician intervene to relieve intolerable suffering at the end of one's life. Furthermore, such a result conflicts with what many of us would desire when faced with severe pain and an inevitable death.

Many citizens of this state are disturbed by defendant Kevorkian's crusade and, at the same time, wish to see a resolution of the difficulties facing the terminally ill. Perhaps even more troubling is that, under this law, an individual is forbidden from consulting with a private, trusted physician about such matters. The recognition of a right to make such private decisions with a trusted physician would allow open and honest discussion with the patient of all options and consequences.

Substantive due process cases invariably address those rights that are considered so fundamental that they cannot be unduly burdened by the state. Here, it is fundamentally wrong not to allow a competent, terminally ill person who is suffering from great pain the opportunity to die with some dignity.

Therefore, I would hold that the plaintiffs may assert a constitutional right to physician-assisted suicide if it can be shown that they have made a competent decision and are suffering from great pain. I would further allow, consistent with *Cruzan*, that the state may require proof of such a competent decision by clear and convincing evidence if it chooses to so legislate.

I would reverse the judgment of the Court of Appeals and allow plaintiffs to document their intent to receive physician-prescribed medications should their terminal illnesses progress to the point of great pain.

/s/ Conrad L. Mallett, Jr.
/s/ Charles L. Levin

FOOTNOTES

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1 In *Griswold* v *Connecticut*, 381 US 479, 500-501; 85 S Ct 1678; 14 L Ed 2d 510 (1965), in concurrence, Justice Harlan outlined the criteria for reviewing constitution claims brought pursuant to the Due Process Clause stating that

> the proper constitutional inquiry in this case is whether [the] statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," . . . .
>
> While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. [Citations omitted.]
>
> * * *
>
> "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times" . . . .

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2 The right that should be recognized here is a privacy right as well as a liberty right. In *Griswold*, *supra*, the United States Supreme Court recognized that decisions of married couples concerning procreation are private in character. In *Thornburgh* v *American College of Obstetricians & Gynecologists*, 476 US 747, 777, n 5; 106 S Ct 2169; 90 L Ed 2d 779 (1986), Justice Stevens observed that "the concept of

privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"

The present case is also analogous to the family or bodily integrity cases to the extent these cases extended liberty interests to matters of public social concern. In *Washington* v *Harper*, *supra*, the Court found that an inmate has a significant liberty interest under the Due Process Clause in avoiding the unwanted administration of drugs. However, the Court found that the state's compelling interest outweighed the inmate's personal liberty interest. In *Loving* v *Virginia*, *supra*, the Court held that couples have a liberty interest to marry outside of there [*sic*] own race.

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3 The United States Constitution does not, nor could it, specifically spell out each right a person maintains as an individual. The application of the express constitutional principles embodied in the Bill of Rights resolves only the easiest cases. Emanating from these principles, however, are implied rights and interests that are no less important to individual liberties than those specifically provided in the Bill of Rights. *Griswold* v *Connecticut*, n 1 *supra*. These rights lie within the parameters of the Bill of Rights, applicable to the states through the Fourteenth Amendment.

Under the First Amendment, these unarticulated rights include the freedom to associate and privacy in one's associations, *NAACP* v *Alabama ex rel Patterson*, 357 US 449, 462; 78 S Ct 1163; 2 L Ed 2d 1488 (1958); the right to educate a child in a school of the parent's choice, *Pierce* v *Society of Sisters*, 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925); and the right to study the German language in a private school, *Meyer* v *Nebraska*, 262 US 390; 43 S Ct 625; 67 L Ed 1042 (1923). Tangential to the Fourth Amendment right to be free from unlawful search and seizure is a limited right to be free from the unlawful withdrawal of blood. *Schmerber* v *California*, 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966). Attached to the Ninth Amendment is the historical recognition that additional rights exist outside the constitution's plain wording.

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. [*Griswold*, *supra* at 488 (Goldberg, J., concurring).]

The concept that courts may construct new liberty rights pursuant to the Fourteenth Amendment is well established. Pursuant to the Fourteenth Amendment, there is a fundamental right to marry a person of another race. *Loving* v *Virginia*, 388 US 1; 87 S Ct 1817; 18 L Ed 2d 1010 (1967). Married persons have the right to receive medical advice regarding contraception. *Griswold* v *Connecticut*, *supra*; *Eisenstadt* v Baird, 405 US 438; 92 S Ct 1029; 31 L Ed 2d 349 (1972) (extending the right to unmarried persons); *Carey* v *Popula-*

tion Services International, 431 US 678; 97 S Ct 2010; 52 L Ed 2d 675 (1977) (recognizing the right to sell and distribute contraceptives).

Also pursuant to the Fourteenth Amendment is the line of cases protecting a person's right of personal autonomy and self-determination. Part of the right to personal autonomy is the right to refuse unwanted medical treatment, *Washington* v *Harper*, 494 US 210; 110 S Ct 1028; 108 L Ed 2d 178 (1990), and of course the right to receive an abortion, *Roe* v *Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973); *Casey*, *supra*.

This is not an exhaustive list of the rights that lie within the penumbras of the Bill of Rights, both in terms of the cases already decided as well as those to be decided in the future. As Justice Harlan declared in dissent in *Poe* v *Ullman*, 367 US 497, 543; 81 S Ct 1752; 6 L Ed 2d 989 (1961), these matters fall all along the "rational continuum" of rights. It is a mistake to focus on whether physicianassisted suicide is a right textually demonstrable within the body of the constitution.

The individual liberty interest in ending one's suffering during terminal illness lies within the penumbras of the Ninth and Fourteenth Amendments. Furthermore, there is a privacy right emanating from the Fourteenth Amendment to seek guidance from a physician of choice so that an informed and knowledgeable decision can be made. As with the right to abortion, the right in the present case may be identified either as a privacy or liberty right.

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4 Indeed there is a great deal of historical antecedence for the proposition that abortion is a criminal offense. See *Roe* at 129-141 (tracing the criminal history of abortion).

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5 See *In re Rosebush*, 195 Mich App 675; 491 NW2d 633 (1992) (allowing the parents of a minor the right to determine whether life-sustaining treatment should be withheld or withdrawn from the minor). See also *In re Conroy*, 98 NJ 321; 486 A2d 1209 (1985); *Donaldson* v *Lundgren*, 2 Cal App 4th 1614, 1620; 4 Cal Rptr 2d 59 (1992); *In re Quinlan*, *supra*; *Cruzan*, *supra*, 112 S Ct 2847-2848. See also anno: *Judicial power to order discontinuance of life-sustaining treatment*, 48 ALR4th 67.

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6 However, the Court ultimately held that the state's interest in preserving the orderly administration of its prisons and mental institutions outweighed the inmates right of personal autonomy. *Id.*

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7 See *Brophy* v *New England Sinai Hosp*, 398 Mass 417, 434; 497 NE2d 626 (1986). "The duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity." See also *Cruzan* at 310-311.

This state also protects the rights of the terminally ill to refuse life sustaining treatment as evidenced by the statutory allowance of a patient advocate to make a decision to withhold or withdraw treatment.

> A patient advocate may make a decision to withhold or withdraw treatment which would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death. [MCL 700.496(7)(d); MSA 27.5496(7)(d).]

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8 Recent polls show increasing support for physicianassisted suicide under certain circumstances. In August, 1993, the Journal of Family Practice reported on a survey conducted by the Harvard School of Public Health that 61 percent of all Americans would vote for an initiative legalizing physician-assisted suicide. Furthermore, 52 percent of Americans would consider such an option if it was legal and they were terminally ill and suffering from great pain.

This sentiment also has support among the medical communities of the United States and other westernized nations. A survey of 156 internists and surgeons revealed that 61 percent agreed that doctors were currently practicing euthanasia by either accelerating death or withholding treatment. See Messinger, *A gentle and easy death: From ancient Greece to beyond Cruzan toward a reasoned legal response to the societal dilemma of euthanasia*, 71 Den U L R 175, 201 (1993). Out of 354 physicians responding to a survey conducted by the Medical journal of Australia, 107 had provided the means by which patients could hasten their deaths. However, the number was twice as high for physicians who thought the law should be changed to allow it in some circumstances. In Britain, 273 physicians responded to a similar survey, and over half would consider physicianassisted suicide in some circumstances if it were legal.

Most recently, voters in the State of Oregon approved a referendum (the Death with Dignity Act) that would allow physician-assisted suicide under carefully regulated circumstances. Physicians may prescribe suicide pills to patients with less than six months to live, but only after a second medical opinion and three requests from the patient are received. The patient must also be mentally competent and free from clinical depression.

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9 In *Casey*, 112 S Ct 2804, the Court reaffirmed *Roe*'s essential three-part holding:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial

> obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

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[10] In the only other case directly addressing the constitutionality of an assisted suicide law, *Compassion in Dying* v *Washington*, *supra*, the court was asked to rule on the constitutionality of the State of Washington's assisted suicide law.

The court stated that abortion raises even more difficult questions about competing interests than does suicide by the terminally ill. "In reproductive rights cases, there is not only the interest of the pregnant woman seeking an abortion, but also the potential life interest which cannot speak for itself. By contrast, in the case of assisted suicide involving a competent person, only one life is involved and that individual can voice his or her wishes." *Id.* at 1460. Significantly, the court found that the "concept of existence" language from *Casey* was "almost prescriptive" of recognizing the right of an individual to commit suicide. *Id.* at 1459, citing *Casey*, *supra*, 112 S Ct 2807.

The court concluded:

> "[T]he suffering of a terminally ill person cannot be deemed any less intimate or personal, or any less deserving of protection from unwarranted governmental interference, than that of a pregnant woman. Thus, consonant with the reasoning in *Casey*, such an intimate personal decision *falls within the realm of the liberties constitutionally protected under the Fourteenth Amendment.*" [*Id.* at 1460 (emphasis added).]

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[11] I have signed my colleague's opinion (Levin, J., concurring in part and dissenting in part), and recognize that a person who is terminally ill and suffering from great pain *and is facing an imminent death* falls within the confines of the due process right I would recognize here.

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[12] See also *Quinlan*, *supra* at 41.

> We think that the State's interest . . . weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest.

Moreover, in the abortion context, "*Roe* v *Wade* was less a judgment about the relative importance of maternal liberty and fetal life, than it was a decision about *who* should make judgments of

that sort." Tribe, Constitutional Law, *supra*, p 1352 (contending that the decision is personal to the mother, not the State). Here, it is the individual, *who*, in the appropriate circumstances, should make the decision to hasten death through physician-prescribed medications.

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13 "[T]he common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." [*Cruzan*, *supra* at 277.]

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No. ——

In The

Supreme Court of the United States

October Term, 1994

JACK KEVORKIAN, *Petitioner,*

v.

STATE OF MICHIGAN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

VOLUME II

Appendices B-E: Opinions of Michigan Court of Appeals & Circuit Courts

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VOLUME II

APPENDIX B

OPINION

(State of Michigan — Court of Appeals)

(Dated May 10, 1994)

(TERESA HOBBINS, Plaintiff-Appellee/Cross-Appellant, v ATTORNEY GENERAL, Defendant-Appellant/Cross-Appellee, and MICHIGAN CATHOLIC CONFERENCE, WAYNE COUNTY PROSECUTOR, MICHIGAN RIGHT TO LIFE, and Certain Members of the MICHIGAN LEGISLATURE, Amici Curiæ — No. 164963, LC No. 93-306-178-CZ; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D., Defendant-Appellee — No. 171056, LC No. 93-11482; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D, Defendant-Appellee — No. 172399, LC Nos. 93-129832-FH, 94-130248-FH)

Before: Fitzgerald, P.J., and Taylor and D. E. Shelton,* JJ.

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* Circuit judge, sitting on the Court of Appeals by assignment.

FITZGERALD, J.

In these consolidated appeals, we are asked to determine the constitutionality of 1992 PA 270, as amended by 1993 PA 3,[1] MCL 752.1021 et seq.; MSA 28.547(121) *et seq.* Specifically, in docket number 164963, defendant appeals as of right the May 24, 1993, order of Wayne Circuit Judge Cynthia D. Stephens, which declared unconstitutional the criminal provision of the act for violating Const 1963, art 4, § 24 and dismissed the charges against Dr. Kevorkian. Judge Stephens also held that individuals have a constitutional right to commit suicide. In docket number 171056, plaintiff appeals as of right the December 13 and 14, 1993, orders of Wayne Circuit Judge Richard C. Kaufman, which held that a ban on assisted suicide is overbroad because, in some instances, a person has a constitutional right to commit suicide. Finding that Donald O'Keefe had a constitutional right to commit suicide, Judge Kaufman dismissed the charges against Dr. Kevorkian. Judge Kaufman also held that the act did not violate art 4, § 24. In docket number 172399, plaintiff appeals as of right the January 28, 1994, order of Oakland Circuit Judge Jessica Cooper, who also declared unconstitutional the criminal provisions of the act for violating art 4, § 24.

Teresa Hobbins is a terminally ill person who, along with seven health care professionals and another terminally ill person[2] sought a declarator judgment that 1992 PA 270, as amended by 1993 PA 3, MCL 752.1027; MSA 28.547(127), is unconstitutional. Dr. Kevorkian is a physi-

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[1] Aside from reorganizing the language in the title and making minor amendments to the language contained in section 7, 1993 PA 3 did little more than give immediate effect to 1992 PA 270.

[2] The health care professionals were dismissed by the trial court for lack of standing, and the remaining plaintiffs are not parties to this appeal.

cian who has been charged with assisting a suicide in violation of MCL 752.1027; MSA 28.547(127).

Ms. Hobbins and Dr. Kevorkian first contend that 1992 PA 270, as amended by 1993 PA 3, is unconstitutional for violating Const 1963, art 4, § 24, which states that, "No law shall embrace more than one object, which shall be expressed in its title." The question presented is governed by a de novo standard of review. *Mooahesh* v *Dep't of Treasury*, 195 Mich App 551, 562; 492 NW2d 246 (1992).

The object of a law is the aim or general purpose of the enactment. *City of Livonia* v *Dep't of Social Services*, 423 Mich 466, 497; 378 NW2d 402 (1985). While the object must be expressed in the title, the body of the law must be examined to determine whether it embraces more than one object. *Kent Co ex rel Bd of Supervisors* v *Reed*, 243 Mich 120, 122; 219 NW 656 (1928).

The purpose of the one-object rule is to avoid bringing into one bill diverse subjects that have no necessary connection. *Mooahesh*, *supra* at 564. An act may contain all matters germane to its object, *Reed*, *supra*, and any provisions which directly relate to, carry out, and implement the principal object. *City of Livonia*, *supra* at 499. Legislation, if it has a primary object, is not invalid because it embraces more than one means of attaining its primary object. *Local No. 1644, AFSC&ME, AFL-CIO* v *Oakwood Hosp Corp*, 367 Mich 79, 91; 116 NW2d 314 (1962).

The one-object provision is to be construed reasonably and not in so narrow or technical a manner as to frustrate the legislative intent. *Kuhn* v *Dep't of Treasury*, 384 Mich 378, 387-388; 183 NW2d 796 (1971). However, the Supreme Court has not hesitated to hold void legis-

lation enacted to evade the procedural requirements which the Constitution places on legislation. *United States Gypsum* v *Dep't of Revenue*, 363 Mich 548, 554; 110 NW2d 698 (1961).

1992 PA 270 is entitled:

> AN ACT to create the Michigan commission on death and dying; to prescribe its membership, powers, and duties; to provide for the development of legislative recommendations concerning certain issues related to death and dying; to prohibit certain acts pertaining to the assistance of suicide; to prescribe penalties; and to repeal certain parts of this act on a specific date.

Section 1 of the act provides:

> The legislature finds that the voluntary self-termination of human life, with or without assistance, raises serious ethical and public health questions in the state. To study this problem and to develop recommendations for legislation, the Michigan commission on death and dying is created.

Sections 2 through 6 of the act establish the membership of the commission and define its role and duties.

Section 7 of the act creates a new crime of "criminal assistance to suicide," which makes it a felony to:

> (a) Provide[s] the physical means by which the other person attempts or commits suicide.
>
> (b) Participate[s] in a physical act by which the other person attempts or commits suicide.

1992 PA 270 had its origin in House Bill 4501. Examination of both the title and content of HB 4501 at various states of legislative process is necessary to aid in the

inquiry of whether 1992 PA 270 contains more than one object.

As first introduced on March 7, 1991, the sole purpose of HB 4501 was to create a new public act to establish a commission to study certain issues related to death and dying. House Bill 4501 was entitled:

> AN ACT to create the Michigan Commission on Death and Dying; to prescribe its membership, powers, and duties; to provide for the development of legislative recommendations concerning certain issues related to death and dying.

At the time HB 4501 was introduced, Senate Bill 32 and House Bill 4038 were pending before the Judiciary Committee. The bills were devoted to amending the Michigan Penal Code to "prohibit a person from causing, providing the means of, or acting as a participant in a suicide or attempted suicide."

On November 12, 1992, the House Judiciary Committee approved HB 4501. The title and provisions of HB 4501 were amended after the second reading on November 24, 1992, the day after Dr. Kevorkian provided assistance to another suicide, to include criminal proscriptions similar to those contained in SB 32. The amended version of HB 4501 became 1992 PA 270.

The original purpose of HB 4501, as expressed in both the title and body of the bill, was to create a new public act to study certain issues related to death and dying. This bill had no regulatory authority. When HB 4501 was amended to add the substance of SB 32, the additional provisions had another and different objective — to amend the penal code to create the crime of criminal assistance to suicide.

The Attorney General posits both objectives are within the acts primary purpose of regulating assisted

suicide. However, neither the original title of HB 4501 nor the title of 1992 PA 270 as enacted declare such a purpose.[3] A fair reading of 1992 PA 270 reveals that, although encompassing a single "subject,"[4] the legislation has not one, but rather two, primary objectives. These objectives were originally the subjects of two distinct bills. One bill (HB 4501) encompassed the study of issues related to voluntary self-termination of life, *with or without assistance*, and another (SB 32) only encompassed the crime of criminal assistance to suicide. The suggestion that the amendment of HB 4501 to include the substantive provisions of SB 32 resulted in one primary purpose of "regulating assisted suicide" is unpersuasive in the absence of a comprehensive declaration of such a purpose in the title of the act. *People* v *Milton*, 393 Mich 246-247; 224 NW2d 266 (1974).

Had the Legislature intended to codify or regulate the general "subject" of assisted suicide,[5] it could have notified the public of this intention by declaring a single broad purpose and by joining the object contained in HB 4501 with the object contained in SB 32 together in one bill. This the Legislature did not do. This failure resulted in the body of the act containing two distinct objects. The fact that the title was amended to reflect the addition of section 7 does not cure the constitu-

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[3] If the primary purpose of HB 4501 was to regulate assisted suicide, it would have been unnecessary for the Legislature to amend the title of HB 4501 because a title need not be an index of an act's provisions. *Builder's Square*, *infra* n 4 at 498.

[4] The one-object provision may not be circumvented by enacting a law that involves a single subject but is designed to accomplish different objectives. *Advisory Opinion*, *supra* at 129-130.

[5] See, e.g., *Builders Square* v *Dep't of Agriculture*, 176 Mich App 494; 440 NW2d 639 (1989) (a case on which the Oakland County prosecutor relies) and numerous other codified areas of the law, e.g., the drain code and the insurance code.

tional infirmity. The one-object provision may not be circumvented by creating a title that includes different legislative objects. *Hildebrand* v *Revco*, 137 Mich App 1, 11; 357 NW2d 778 (1984). We find, therefore, that 1992 PA 270 as enacted has two distinct objects which, although encompassing the same "subject," are not germane to each other, are directed toward different purposes and, when grouped together in one act, offend the constitutional one-object provision.[6] In reaching this conclusion, we recall the Supreme Court's pronouncement in *Advisory Opinion on Constitutionality of 1975 PA 227 (Question One)*, 396 Mich 123, 133; 240 NW2d 193 (1976):

> This Court is mindful of the worthy purpose and high motivation of the Legislature and the proponents of the subject Act. It also is mindful of the basic dictates of the Constitution of this state. Our test cannot be one of policy but one of constitutionality. On that test, the Act must fall.

The Oakland County prosecutor relies on *People* v *Trupiano*, 97 Mich App 416; 296 NW2d 49 (1980). *In Trupiano*, provisions of Michigan's Public Health Code created departments charged with enforcing the code and included a provision to prescribe criminal penalties for possession of controlled substances, survived a constitutional challenge based on a violation of the one-object doctrine.

Trupiano is distinguishable from the instant case. *Trupiano* involved a legislative enactment that constituted a "code." As noted by the Court in *Trupiano*:

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6 To buttress our conclusion, though certainly not controlling, we have in this case the opinion from the counsel for the House Judiciary Committee that the amendment of HB 4501 would violate the one-object provision of art 4, § 24. Similarly, in analyzing HB 4501 as enrolled, the House Legislative Service Bureau opined that the bill is subject to a constitutional challenge based on art 4, § 24.

The Supreme Court has recognized a wide degree of discretion in reviewing legislative enactments which constitute a "code." In *Advisory Opinion re Constitutionality of 1972 PA 294, supra*, the Court noted at 463:

> "Emphasis is given to the fact that the subject matter constitutes a code and that inherently the scope of a code must be broad enough to encompass the various facets necessary to the drafting of a unified law. If we fail to permit such a design codes may not be enacted in Michigan so long as the 'one-object' limitation is present in the constitution."

Thus, codes that have a general purpose or aim that is implemented through a number of specific statutory provisions have survived challenges based on a violation of the one-object clause because if too strict a reading is given article 4, section 24, no codes enacted in Michigan would be constitutional. See *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 463; 208 NW2d 469 (1973). The act in this case is not a codification, and as previously noted, the attempt to define the object broadly to encompass all subjects related to the issue of assisted suicide is unpersuasive.

1992 PA 270, as amended by 1993 PA 3, violates the one-object provision of Const 1963, art 4, § 24 and is, therefore, unconstitutional. In light of this conclusion, we need not address the remainder of the constitutional challenges to the act However, in anticipation of Supreme Court review, and in the interest of judicial economy, we will briefly address Ms. Hobbins' argument that Michigan's assisted suicide statute deprives its citizens of a constitutional right protected by the Due Process Clause of the Fourteenth Amendment.

In *Roe* v *Wade*, 410 US 113; 93 S Ct 704; 35 LEd 2d 147 (1973), the United States Supreme Court posited the existence of a "right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 US at 153. The Court, however, expressly stated that this "privacy right . . . cannot be said to be absolute[,]" and noted that it has consistently "refused to recognize an unlimited right of this kind in the past" *Id.* at 154. Essential to the analysis in the case at bar is the Supreme Court's recognition and affirmation of the State's compelling interest in protecting life: "[T]he State's important and legitimate interest . . . in protecting fetal life after viability [justifies legislation that] may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163-164. Furthermore, "a State [has] an unqualified interest in the preservation of human life . . . ." *Cruzan* v *Director, Missouri Dep't of Health*, 497 US 261, 282; 110 S Ct 2841; 111 L Ed 2d 224 (1990). The constitutionality of legislative enactments to protect life is clearly established in our law.[7]

When individuals assert constitutional rights against state regulation, whether encompassed by the "zones of privacy" recognized in *Roe* or acknowledged as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment, a court must balance the individual interest against the state's interest *Cruzan*, 497 US at 279; *Roe*, 410 US at 154. It is, of course, necessary that the asserted right be one that is accorded constitu-

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[7] The legitimate state interest in protecting life recently was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 505 US ___, ___, ___, ___, ___; 112 S Ct 2791; 120 LEd 2d 674, 710, 738, 773, 783 (1992).

tional protection under our law. Such is not the case in the instant matter.

Determination of the existence of "rights not readily identifiable in the Constitution's text" sometimes, as in the opinions under review here, seems merely "the imposition of the [judges'] own choice of values . . . ." Attempting "to identify the nature of the rights qualifying for heightened judicial protection[,]" the Supreme Court has ruled "that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' [Alternatively,] they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.'" *Bowers* v *Hardwick*, 478 US 186, 191-192; 106 S Ct 2841; 92 LEd 2d 140 (1986) (citations omitted). The "right" asserted by Ms. Hobbins — the right to commit suicide — satisfies neither definition.

The scope of rights encompassed by the concept of ordered liberty does not include the right to commit suicide, much less the right to assisted suicide. The "guarantee of personal privacy" has been "exten[ded] to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Roe*, 410 US at 152-153. (citations omitted). Judicial discovery of a right to terminate one's life is not a logical extension of this catalog of rights.[8] Liberty and justice will not cease to exist if a right to commit suicide is not recognized.

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[8] Even in these areas, the Supreme Court has not found that all rights are implicit in the concept of ordered liberty. For example, the Court has expressly rejected the contention that a right to consensual sodomy is implicit in the concept of ordered liberty, or that an unwed father's liberty interest was violated by a statute's presumption that the husband of the child's mother is the child's father and which denied him any right to visitation. *Bowers*, *supra*; *Michael H* v *Gerald D*, 491 US 110; 109 S Ct 2333; 105 LEd 2d 91 (1989)).

Plaintiffs argue that the liberty interest[9] recognized in *Cruzan* supports the broader concept of a right to self-determination, which necessarily encompasses the right asserted here. However, plaintiffs misapprehend the true nature of the right recognized in *Cruzan*.

The Supreme Court began its discussion of the issue before it by noting the common law basis of "the right of a competent individual to refuse medical treatment [and stating] that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . . ." The Court noted: "This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a 'right to die.'" The Court then made clear its intention to "follow the judicious counsel . . . 'not to attempt, by any general statement, to cover every possible phase of the subject.'" *Cruzan*, 497 US at 277-278. (citation omitted). The right recognized in *Cruzan* was only to refuse unwanted medical treatment and passively die a natural death, not to actively intervene so as to hasten one's death. Furthermore, even this limited right is not absolute: "It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." *Id.* at 281. The right asserted by plaintiffs is not a fundamental liberty; liberty and justice will not cease to exist as a result of this Court's decision not to accord it constitutional status.

Neither is the right to commit suicide deeply rooted in this nation's traditions. At common law, a suicide

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9 The *Cruzan* court noted that "many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy," [see, e.g., *In re Quinlan*, 70 NJ 10; 355 A 2d 647 (1976)] but expressed its belief that "this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Cruzan*, 497 at 279 n 7 (citation omitted).

incurred criminal liability and harsh penalties. "Although the States abolished the penalties . . . , they did so to spare the innocent family and not to legitimize the act" *Id.* at 294 (Scalia, J., concurring). Furthermore, "[c]ase law at the time of the adoption of the Fourteenth Amendment generally held that assisting suicide was a criminal offense. . . . And most states that did not explicitly prohibit assisted suicide in 1868 recognized, when the issue arose in the 50 years following the Fourteenth Amendment's ratification, that assisted and (in some cases) attempted suicide were unlawful." *Id.* (citation omitted). There is, therefore, no significant support for the proposition that a right to commit suicide is rooted at all in our nation's history.

There is a "rationalizing principle" that justifies the inclusion of non-textual rights on the list of protected rights that designates them as "implicit in the concept of ordered liberty." Faced with an individual rights challenge to a legislative enactment, the courts must answer this question: "Does [the statute] violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?'" *Palko* v *Connecticut*, 302 US 319, 325, 328; 58 S Ct 149; 82 LEd 288 (1937) (citation omitted). As to an alleged right to commit suicide, the answer is clearly no. We therefore decline to find such a right.

The wisdom of judicial circumspection in discovering new constitutional rights has been cogently expressed by Justice Byron White:

> That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having

> little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, . . . the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably preempts for itself another part of the governance of the country without express constitutional authority. [*Moore* v *East Cleveland*, 431 US 494, 544; 97 S Ct 1932; 52 LEd 2d 531 (White, J, dissenting).]

The orders in docket numbers 164963, 171056, and 172399 dismissing the charges of providing assistance to suicide are affirmed.[10] Judge Stephens' order in docket number 164963 and Judge Kaufman's order in docket number 171056 are reversed with respect to their holdings regarding a constitutional right to commit suicide. Judge Kaufman's order in docket number 171056 is also reversed with respect to the holding that the statute does not violate the title-object provision.

/s/ E. Thomas Fitzgerald

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[10] Judge Kaufman reached the correct result in dismissing the case, albeit for the wrong reason.

OPINION CONCURRING IN PART AND DISSENTING IN PART

(TERESA HOBBINS, Plaintiff-Appellee/Cross-Appellant, v ATTORNEY GENERAL, Defendant-Appellant/Cross-Appellee, and MICHIGAN CATHOLIC CONFERENCE, WAYNE COUNTY PROSECUTOR, MICHIGAN RIGHT TO LIFE, and Certain Members of the MICHIGAN LEGISLATURE, Amici Curiæ — No. 164963, LC No. 93-306-178-CZ; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D., Defendant-Appellee — No. 171056, LC No. 93-11482; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D, Defendant-Appellee — No. 172399, LC Nos. 93-129832-FH, 94-130248-FH)

SHELTON, J. (concurring in part and dissenting in part).

I concur in the opinion of Judge Fitzgerald that 1992 PA 270, as amended by 1993 PA 3, violates the one-object provision of our State Constitution. I therefore concur in affirming each of these three cases. I dissent from that portion of the opinion which dismisses the claims under the due process clause of the United States Constitution and write separately to address that issue.

It is the seminal claim of Ms. Hobbins and the other terminally ill plaintiffs, as well as Dr. Kevorkian and the original physician plaintiffs in *Hobbins*, that a suffering, terminally ill person has a constitutional right to control his or her own body to end his or her suffering by death and with the assistance of a physician. The constitutional claim is derived from the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides that no State shall "deprive any person of life, liberty, or property, without due process of law." For over one hundred years, the Supreme Court has held that this clause includes substantive as well as procedural rights. See *Mugler* v

Kansas, 123 US 623; 8 S Ct 273; 31 LEd 205 (1887); *Poe* v *Ulman*, 367 US 497; 81 S Ct 1752; 6 LEd 2d 989 (1961); *Daniels* v *Williams*, 474 US 327; 106 S Ct 662; 88 LEd 2d 662 (1986); *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 505 US ___; 112 S Ct 2791; 120 LEd 2d 674 (1992). In this manner, the Constitution protects the fundamental rights of citizens which comprise their "liberty" against invasion by the State.

The scope of these substantive liberties is not limited to those provided by the Bill of Rights or to those rights recognized at the time the clause was enacted. Nor, as urged by appellants, can they be defined by some formula based upon prior "tradition and practices," although tradition is a factor. The Supreme Court recently addressed this concept in *Casey*, 112 S Ct at 2806:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:
>
> > "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty

> and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds upon what has survived is likely to be sound. No formula could serve as a substitute, in this area for judgment and restraint." [Quoting *Poe, supra* at 542.]

If the determination of which liberties are included within the meaning of the "due process" were delimited by tradition alone, no expansion of liberties in the name of the Constitution would ever have been made in the last two centuries.[1]

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[1] **The conclusion that "the right to commit suicide" is not deeply rooted in this nation's traditions certainly is not therefore dispositive. More importantly, the statement that "[t]here is . . . no significant support for the proposition that a right to commit suicide is rooted at all in our nation's history" is factually incorrect. Suicides by terminally ill persons have occurred throughout our history and indeed have often taken place with the quiet and unpublicized assistance of treating physicians and family members. The following was noted in *Care of the Hopelessly Ill*, by T. E. Quill, C. K. Cassel, and D.E. Meier, The New England Journal of Medicine (Nov. 5, 1992) 1380 at 1381:**

> **It is not known how widespread physician-assisted suicide currently is in the United States, or how frequently patients' requests are turned down by physicians. Approximately**

(*concluded on page A-127*)

Our judicial history has of course been to the contrary and we must initially look for guidance to the panoply of rights which the Supreme Court has previously defined as individual "liberties" to determine if a personal right to end suffering by hastening one's own death is rationally within the scope of that constitutional protection. I conclude that it is.

Most of the Supreme Court decisions which describe the compass of an individual's right to "liberty" or freedom from government intrusion have involved personal and family decisions. These cases must be viewed as a developing "rational continuum," as described by Justice Harlan in *Poe*, *supra* at 543. Taken together, they demonstrate that the Supreme Court has found that the due process clause of our Constitution limits the power of the government to intrude into personal decisions involving the basic integrity of an individual's body or family. Justice O'Connor spoke for the Court in *Casey*, *supra* at 2807, and described the essence of the cases defining "liberty":

(*continued from page A-126*)

> **6000 deaths per day in the United States are said to be in some way planned or indirectly assisted, probably through the "double effect" of pain-relieving medications that may at the same time hasten death or the discontinuation of or failure to start potentially life-prolonging treatments. From 3 to 37 percent of physicians responding to anonymous surveys reported secretly taking active steps to hasten a patient's death, but these survey data were flawed by low response rates and poor design. Every public opinion survey taken over the past 40 years has shown support by a majority of Americans for the idea of physician-assisted death for the terminally ill.**

Additionally, the issue here is not whether a healthy person should be granted an unrestricted "right to commit suicide" but rather the ability of a suffering terminally ill patient to decide to end that suffering with death and to have a doctor assist in implementing that decision.

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey* v *Population Services International*, 431 US, at 685, 52 LEd 2d 675, 97 S Ct 2010. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v *Baird*, [405 US] at 453, 31 LEd 2d 349, 92 S Ct 1029 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." *Prince* v *Massachusetts*, 321 US 158, 166, 88 LEd 645, 64 S Ct 438 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.* Beliefs about these matters could not define the attributes of personhood where they formed under compulsion of the State. [Emphasis added.]

In *Casey*, the Court reaffirmed its decision in *Roe* v *Wade*, 410 US 113; 93 S Ct 705; 35 LEd 2d 147 (1973), that a woman has the liberty to decide whether to have an abortion prior to the viability of the fetus. The Court in *Roe* described this realm of protected personal liberties as the "right of privacy." In *Cruzan* v *Director, Missouri Department of Health*, 497 US 261; 110 S Ct 2841; 111 LEd 2d 224 (1990), the Supreme Court addressed the issue that had been posed earlier in *In re Quinlan*, 70 NJ 10; 355 A2d 647 (1976). In *Quinlan*, the Court found that a severely brain damaged woman had a right of privacy,

protected by the federal constitution, which included her right to terminate the use of equipment that was prolonging her existence. In *Cruzan*, the Supreme Court affirmed the principal of *Quinlan* that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment" even if that refusal will result in that person's death. The Court found that even "the refusal of artificially delivered food and water is encompassed within that liberty interest." As Chief Justice Rehnquist put it, "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality." *Cruzan, supra* at 281.[2]

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[2] The *Cruzan* decision followed a number of state court decisions in addition to *Quinlan*. Some of those opinions offer insights which are helpful. In *Bouvia* v *Superior Court*, 179 Cal App 3d 1127 at 1147, 225 Cal Rptr 297 at 307 (1986), Justice Compton in his concurring opinion stated:

> Elizabeth apparently has made a conscious and informed decision that she prefers death to continued existence in her helpless and, to her, intolerable condition. I believe she has an absolute right to effectuate that decision. The state and the medical profession instead of frustrating her desire, should be attempting to relieve her suffering by permitting and in fact assisting her to die with ease and dignity. The fact that she is forced to suffer the ordeal of self-starvation to achieve her objective is in itself inhumane. The right to die is an integral part of our right to control our own destinies as long as the rights of others are not affected. That right should, in my opinion, include the ability to enlist assistance from others, including the medial profession, in making death as painless and quick as possible.

And in *McKay* v *Bergstedt*, 801 P2d 617, 624-626 (Nev 1990), the Nevada Supreme Court stated:

> At some point in the life of a competent adult patient, the present or prospective quality of life may be so dismal that the right of the individual to refuse treatment or elect discontinuance of artificial life support must prevail over the interest of the state in preserving life. In instances where the prospects for a life of quality are smothered by physical pain and suffering, only the sufferer can determine the value of continuing mortality . . . . The State's interest in the preservation of life relates to meaningful life.

Against this background, we are squarely presented with the question of whether the situation of an assisted suicide to a suffering terminally ill person is significantly different from the rights defined by the Supreme Court in those cases. To pose the questions makes the answer obvious. If a terminally ill person can lawfully end her life by disconnecting a life-sustaining machine (*Cruzan*), why cannot she end that same life by connecting a life-ending machine? If a healthy woman can lawfully terminate a healthy fetus (*Roe, Casey*), does not that same woman who is later terminally and painfully ill have a right to terminate her own life? Does the State have a right to totally prevent a terminally ill person from ending his or her life by charging the doctor who assists her with a four year felony, or even with murder?[3] If a doctor (or even a nurse or medical assistant) can lawfully end a patient's life by disconnecting a life-sustaining machine (*Cruzan*), why cannot a doctor do the same by connecting a life-ending machine? If a healthy woman has a right to have a doctor assist (and indeed can only use a doctor to assist) to lawfully terminate a healthy fetus (*Roe, Casey*), does not that same woman who is later terminally and painfully ill have a right to have a doctor assist to terminate her own life? If ending one's own life is a lawful act, how can the state punish a doctor who assists in that lawful conduct?

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3 In a separate opinion in *People* v *Kevorkian*, Docket No. 154740, Judges Fitzgerald and Taylor have held that Dr. Kevorkian may be charged with the crime of murder for assisting in a suicide prior to the enactment of the statute which is at issue in these cases. Although the majority has chosen to separate the opinions, these cases were consolidated because they all pose the same Constitutional issue. I have dissented from the opinion in No. 154740 primarily based upon the reasons set forth in my opinion in these cases. It seems self-evident that if the State may not constitutionally criminalize conduct with a four year felony, it clearly may not do so with a murder charge.

The federal district court in Washington very recently analyzed a similar assisted suicide statute in that State and similarly concluded that *Casey* and *Cruzan* require the courts to find a constitutionally protected liberty interest in the decision of a terminally ill person to hasten death. In *Compassion in Dying* v *Washington*, __ F Supp __ (Docket No. C94-119R, U.S.D.C., W.D. Wash, dec. May 3, 1994), Judge Rothstein held:

> Like the abortion decision, the decision of a terminally ill person to end his or her life "involv[es] the most intimate and personal choices a person may make in lifetime" and constitutes a "choice[] central to personal dignity and autonomy."

and:

> There is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death. From a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult.

The majority opinion on this issue attempts to draw such a distinction from *Cruzan* on the basis that "the right recognized in *Cruzan* was only to refuse unwanted medical treatment and passively die a natural death, not to actively intervene so as to hasten one's own death." This is apparent acceptance of the State's suggestion that it is the active rather than passive nature of the assistance here which extinguishes the right of the suffering patient. Aside from serious questions of

whether starving Ms. Cruzan to death was "natural," the best reply to this suggestion is perhaps found in Justice Scalia's concurrence in *Cruzan*, *supra* at 296-297:

> Suicide, it is said, consists of an affirmative act to end one's life; refusing treatment is not an affirmative act "causing" death, but merely a passive acceptance of the natural process of dying. . . . It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing.
>
> * * *
>
> . . . Starving oneself to death is no different from putting a gun to one's temple as far as the common law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious decision to "pu[t] an end to his own existence." [Quoting 4 Blackstone, *Commentaries*, p 189.]

If the active-passive distinction has any meaning, it would not be in the situations presented here. The third person who turns off the life-supporting machine must perforce affirmatively do so. Here, the assistant places the means within the control of the patient and allows the patient to take the final active step.

On a far less legalistic basis, the honest intention of the assisting person in both instances is the same. When the medical person turned off the life supporting machinery to Karen Quinlan, that person intended and expected the patient to die just a surely as did Dr. Kevorkian when he showed his suffering patients how to

activate his lethal devices and placed the devices within their control. If anything, the intent is less onerous in these instances since, at least as compared to Ms. Quinlan and other incompetent patients, these patients made the final personal decision and took the final personal action for themselves.

It is also suggested by the State that it is the involvement of another person in assisting the death that makes the situation different Such a contention ignores the clear import of *Roe*, *Casey*, *Quinlan*, *Cruzan*, and all of the other due process cases involving medical procedures. A woman's right to have an abortion involves, by necessity and for safety, the assistance of another person. Similarly, it is obvious that neither Ms. Quinlan nor Ms. Cruzan were going to be able to terminate their life support equipment without the assistance of another person. Indeed the availability of that assistance was what those cases were, and what these cases are, ultimately about. Again, if anything, the situations here involve less immediate assistance because the patients personally activated the equipment which caused their death.

In the end, as far as the liberty interest of the patient is concerned, the truth is that there is simply no rational distinction between assisting the termination of life support to a suffering terminally ill patient and assisting the administration of life ending measures to a suffering terminally ill patient.

Aside from a review of the cases in which the Supreme Court has previously defined the rights and liberties protected by Constitutional due process, we must decide if the right to end personal pain and suffering is "implicit in the concept of ordered liberty." Liberty in the context of our Constitution means the freedom of an individual to determine matters about

him or her self for him or her self and not have others, even if they are in the majority and thus comprise the government, force their will upon the individual. The basic concept of self determination and personal autonomy is the central point of our Constitutional structure. In matters that relate solely to our selves, we alone are free to decide our personal fate and neither the mob nor the government may take that away from us. As the Supreme Court said over one hundred years ago in *Union Pacific Railway Co* v *Botsford*, 141 US 250; 11 S Ct 1000; 35 LEd 734 (1891):

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley on Torts, 29.

In the context of these cases, the essence of self determination is the decision of whether to continue to endure insufferable pain. The power to determine the limits to which one can endure pain and agony is certainly intrinsic to this basic concept of personal autonomy. It is difficult to imagine a more personal choice than whether to continue life when faced with a terminal and excruciatingly painful condition. The poignant truth of Justice O'Connor's observation in *Casey*, *supra*, makes it worthy of repetition:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. [*Casey*, *supra* at 2807.]

The real issue in these cases is not whether there is some broad "right to commit suicide" but rather whether an individual, and not the government, has the right of choice between enduring pain and suffering or ending that suffering with death. Stated conversely, the issue is whether our government has the right to force us, against our will, to live out a life of pain and suffering when we have done no wrong to anyone else. I conclude, without hesitation, that our Constitution preserves and guarantees our right to make that decision for ourselves and that it forbids the government from taking that choice from us when we have done no wrong. There could be no more basic right in our ordered concept of liberty.

This conclusion, however, does not mean that the State may not regulate and control that choice. As the Court said in *Cruzan*, *supra* at 279:

> But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondents constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Youngberg* v *Romeo*, 457 U.S. 307, 321; 73 L Ed2d 28, 102 S Ct 2452 (1982).

Certainly where the state has a legitimate interest in such matters as the preservation of life and family, the Court has indicated that it may fetter individual choice in those areas with a variety of controls and impediments designed to insure that the choice is voluntarily and knowingly made and that it is implemented under safe and reasonable conditions. Indeed, in *Cruzan* the Court upheld Missouri's insistence upon a requirement of clear and convincing evidence to establish the patient's true intent And, in *Webster* v *Reproductive*

Health Services, 492 US 490; 109 S Ct 3040; 106 LEd 2d 410 (1989), as well as *Casey*, *supra*, the Court clearly indicated that it would allow the states considerable latitude in controlling and regulating the choice of a woman to have an abortion.

The State of Michigan clearly has public interests in the decision of a suffering terminally ill patient to end that suffering with death. In addition to its generally recognized interest in the preservation of life, the State may legitimately be concerned, for example, that the patient be given ample opportunity for medical consultation about the nature and permanence of the underlying condition, that the patient has received available medical and psychiatric assistance, or that the procedure is performed under proper medical conditions by an appropriate medical assistant. Indeed, this is an area of medical concern where the State clearly should be involved to insure the public welfare.

But the extent to which the state may fetter or control the patient's liberty to choose death is not before us. If the Michigan assisted suicide statute "has the purpose or effect of placing a substantial obstacle in the path" of the exercise of a constitutionally protected liberty interest, the statute violates due process. *Casey*, *supra* at 2820. In this statute, the State has chosen to do virtually the only thing which the Constitution does not allow: the absolute prohibition of the making of that personal choice by criminalizing it. The appellants assert that this is a permissible means of "regulating" a personal liberty interest because of the overwhelming interest of the state. The argument stems from what some have characterized as the "slippery slope" fear that anything less than a total prohibition of assisted suicide will eventually result in the uncontrolled and irresponsible taking of a multitude of lives in situations

far less compelling than the individuals involved in these cases. The argument is unsound. If a state can "regulate" such a personal choice by completely prohibiting it, there would be no meaningful choice in the first instance. As stated in *Compassion in Dying* v *Washington, supra:*

> But despite the general validity of the State's concern, the slippery slope argument cannot prevail in this instance. It may be difficult to define the kinds of assistance which are necessary and should be permitted in order to honor terminally ill patients' liberty interest in hastening their death. However, that is not a sufficient excuse for precluding *entirely* the exercise of a constitutional right. The court has no doubt that the legislature can devise regulations which will define the appropriate boundaries of physician-assisted suicide for terminally ill individuals, and at the same time give due recognition to the important public policy concerns regarding the prevention of suicide.

We need not speculate here about the extent to which the State may regulate the liberty involved here. We need only say, and should say, that the State may not completely outlaw it as this statute purports to do. This government may not totally take from us our inherent right to determine not only who we are but, even more essentially, whether we are.

/s/ Donald E. Shelton

OPINION CONCURRING IN PART AND DISSENTING IN PART

(TERESA HOBBINS, Plaintiff-Appellee/Cross-Appellant, v ATTORNEY GENERAL, Defendant-Appellant/Cross-Appellee, and MICHIGAN CATHOLIC CONFERENCE, WAYNE COUNTY PROSECUTOR, MICHIGAN RIGHT TO LIFE, and Certain Members of the MICHIGAN LEGISLATURE, Amici Curiæ — No. 164963, LC No. 93-306-178-CZ; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D., Defendant-Appellee — No. 171056, LC No. 93-11482; PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JACK KEVORKIAN, M.D, Defendant-Appellee — No. 172399, LC Nos. 93-129832-FH, 94-130248-FH)

TAYLOR, J. (concurring in part; dissenting in part)

I join Judge Fitzgerald's substantive due process analysis without any reservations. However, I respectfully dissent from the majority's interpretation of the title-object clause, Const 1963, art 4, § 24. The Assistance to Suicide Act (the Act), 1992 PA 270, as amended by 1993 PA 3, MCL 752.1021 *et seq.*; MSA 28.547(121) *et seq.*, does not violate this constitutional provision.

At the outset, I would call attention to the well-established maxims of judicial review applicable in cases where constitutional challenges are brought against legislative enactments:

> A statute will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of legislation. * * * Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt

> that it violates some provision of the Constitution that a court will refuse to sustain its validity. A statute is presumed to be constitutional and it will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt. [*Rohan* v *Detroit Racing Association*, 314 Mich 326, 341-342; 22 NW2d 433 (1946).]

Construing identical language over a century ago, our Supreme Court explained the purpose of the title-object clause as follows:

> The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require

> that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it. [*People* v *Mahaney*, 13 Mich 481, 494-495 (1865).]

In finding the Act violative of art 4, § 24, the lower court opinions, as well as the majority here, emphasize that this clause is intended to prevent the combination in one bill of legislative goals or objects "having no necessary connection." The majority concludes that the Act contains two objects — study of possible legislative action concerning assisted suicide and the criminalization of assisted suicide — and that these objects have no necessary connection. This confuses the object of the Act with the means utilized to accomplish that object. It also gives a crabbed reading to the phrase "no necessary connection," depriving it of its intended meaning by taking it out of its context in the *Mahaney* case.

The majority argues that the statute has one subject, but two objects. That is, at best, to put too fine a point on things. Our Supreme Court has explained that "[t]he 'object' of a law is its general purpose or aim." *Livonia* v *Department of Social Services*, 423 Mich 466, 497; 378 NW2d 402 (1985). Furthermore,

> [t]o require that every end and means necessary to the accomplishment of this general object should be provided for by a separate act relating to that alone, would not only be senseless, but would actually render legislation impossible. [*Id.*]

The majority would hold that if they can plausibly posit the existence of two "objects," then these "objects" have no necessary connection. This is contrary to the meaning of the phrase as used by the *Mahaney* court

More importantly, it confuses the means used to accomplish a general object with the object itself.

Our Supreme Court "has long and consistently said that art 4, § 24, and similar 'one object' provisions in earlier constitutions, are to be construed reasonably 'and not in so narrow and technical a sense as unnecessarily to embarrass legislation.'" *Kuhn* v *Department of Treasury*, 384 Mich 378, 387; 183 NW2d 796 (1971). The majority refuses to acknowledge the import of this holding, even though citing it approvingly, by immersing itself in irrelevant procedural minutiae that does not pertain to the title-object analysis. The general legislative intent as expressed in the Act is the only appropriate focus of a title-object inquiry. Simply stated, a court should endeavor to discern a unity of purpose and only when such cannot be found declare the Act invalid. To do otherwise is unnecessarily to embarrass legislation. The majority's position runs contrary to the appropriate deference to the Legislature that has characterized judicial review in this state. *Rohan*, *supra*.

In the case at bar, it is unquestionable, I believe, that the general purpose or object of the Act is to formulate an appropriate legislative response to the issue of assisted suicide. That there would be different provisions carrying forward this aim not only is proper but is altogether routine and expected when the Legislature does its work.

The provisional criminalization of assisted suicide, while the Commission on Death and Dying took testimony and made recommendations as to a long term solution, was intended to allow the issue to be addressed in an atmosphere conducive to calm deliberation. This method of assisting the commission is consistent with the object of the legislation. The Act, therefore, "is confined to the means supposed to be

important to the end indicated," *Mahaney*, *supra* at 496, and merely "authorize[s] the doing of all things which may fairly be regarded as in furtherance of the general object of the enactment" *Kent County* v *Reed*, 243 Mich 120, 123; 219 NW 656 (1928). The Act does not violate the title-object clause of art 4, § 24.[1]

Neither does the Act violate the change of purpose clause of art 4, § 24.[2] The clause states:

> No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

A related provision (the "five-day rule"), found in art 4, § 26, states:

> No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days.

In *Anderson* v *Oakland County Clerk*, 419 Mich 313; 353 NW2d 448 (1984), our Supreme Court, discussing the change of purpose clause and the five-day rule, stated:

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1 Although acknowledged as "certainly not controlling," the majority cites the opinions of counsel for the House Judiciary Committee and the House Legislative Services Bureau that the Act violates the title-object clause. The majority feels that such opinions buttress their conclusion that the Act is unconstitutional. To so hold requires that one assume that upon reading and considering the advice from their staff the members of the Legislature decided to act in violation of their oaths to comply with the constitution. This is an impermissible assumption. Rather, the assumption should be that, expressly alerted to a constitutional issue, they considered it and found that acting in the way they did was constitutional *Marbury* v *Madison*, 5 U.S. (1 Cranch) 137 at 179-180 (1803).

2 Though not discussed in the majority opinion, I briefly discuss the issue of the change of purpose clause because it was decided in the three lower court opinions under review.

> These are not recent provisions. A long history underscores an intent through these requirements to preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration irrespective of legislative merit.
>
> The five-day rule and the change of purpose provision were contained in the same article and section of the Constitution of 1908. Const 1908, art 5, § 22. It is clear that the function of the change of purpose provision, both in the Constitution of 1908 and as modified in the Constitution of 1963, is to fulfill the command of the five-day rule. [*Anderson* at 329-330 (footnotes omitted).]

The opponents of the statute assert that inclusion of the temporary criminalization provision violated the change of purpose clause. However, as I have earlier indicated, there was only one purpose served by all provisions, and thus there is no violation of the change of purpose clause of art 4, § 24.

Furthermore, even if 1992 PA 270 violated the change of purpose clause, the entire Act was amended and reenacted as 1993 PA 3. An amendatory act by its nature supersedes its predecessor and replaces it. *Lahti* v *Fosterling*, 357 Mich 578, 587-588; 99 NW2d 490 (1959). Because 1993 PA 3 has at all times included both the criminalization and study commission provisions, and because 1993 PA 3 is the only relevant act, the change of purpose clause was not violated.

As to the five-day rule, the legislative history of the Act, recounted in the majority opinion, shows that the criminalization provision, in what became 1992 PA 270, was added on November 24, 1992, more than five days before passage on December 3, 1992. Therefore, I would

hold that 1992 PA 270 complied with the requirements of the five-day rule. The Senate bill that became 1993 PA 3 was introduced on January 26, 1993, at which time it contained the study provisions and the temporary criminalization provision. It was enacted on February 25, 1993. Accordingly, I would hold that 1993 PA 3 also complied with the five-day rule.

As noted at the outset, I concur with Judge Fitzgerald's substantive due process analysis. However, I dissent with respect to art 4, § 24. I would reverse on that basis in docket nos. 164963 and 172399, and would affirm the analysis of art 4, § 24 in docket no. 171056.

/s/ Clifford W. Taylor

APPENDIX C

OPINION

(State of Michigan — Circuit Court — County of Oakland)

(Dated January 27, 1994)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v. DR. JACK KEVORKIAN, Defendant — Case Number 93-129832-FH, Case Number 93-130248-FH; Hon. Jessica R. Cooper)

At a session of said Court, held in the Courthouse, City of Pontiac, County of Oakland, State of Michigan, on the 27th day of January, 1994.

PRESENT: Hon. Jessica R. Cooper

This matter comes before the court on defendant's motion to dismiss charges brought against him for assisting in the suicides of Merian Frederick and Dr. Ali Khalili.

The motion challenges the constitutionality of 1992 P.A. 270 as amended by 1993 P.A. 3. Said statute makes it a felony to intentionally provide the physical means to complete a suicide or participate in the physical act once one has knowledge of another's intention to commit suicide.

Dr. Kevorkian challenges this statute on the basis of both the Michigan and the United States Constitution. There does not appear to be any factual dispute that the defendant did in fact have knowledge of Merian Frederick's and Dr. Khalili's desire to commit suicide nor is there any dispute that the defendant physically provided the means to carry out the suicides.

I.
CONSTITUTIONAL RIGHT OF SELF-DETERMINATION

The defendant contends that the right of self-determination as derived under the Ninth and Fourteenth Amendments should be extended to include the right to terminate one's own life when faced with terminal illness and unbearable pain.

Defendant further contends that once that right has been defined to include suicide, it should then be extended to include the right to seek assistance to carry out that end.

Although not specifically addressed by the defendant in his brief, the defendant would have to have standing to derive the rights of these individuals and in that way challenge the constitutionality of the statute under which he is charged.

In order to address these arguments it is necessary to discuss both the privacy and liberty rights of an individual as balanced against the state's compelling interest to protect life.

(A)
PRIVACY

The first Eight Amendments to the United States Constitution express specific fundamental personal rights. The Ninth Amendment states: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." The Supreme Court in *Griswold* v *Connecticut*, 381 U.S. 479, 488, 14 L.Ed. 2d 510, 85 S.Ct. 1678 (1965), examined the history of the Ninth Amendment and found it to "reveal that the framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those

fundamental rights specifically mentioned in the first eight constitutional amendments."

Essentially, the Ninth Amendment allows fundamental rights to be named at a later date. While the right to privacy is not mentioned specifically in the Constitution, "the Court has recognized that a right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe* v *Wade*, 410 U.S. 113, 152, 35 L.Ed. 2d 147, 92 S.Ct. 705 (1970). This right to privacy has been extended by case law to include "activities relating to marriage, procreation, contraception, family relationships, child rearing, education, and abortion.[1]

The court is not left to its discretion to ascertain which rights are fundamental. "The inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions . . ." *Griswold*, *supra* at 493 (Goldberg, concurring) quoting *Powell* v *Alabama*, 287 U.S. 45, 67, 77 L.Ed. 158, 53 S.Ct. 55 (1932).

The right of self-determination, the right to control one's own body, has long been recognized in the common law of the United States. "The right to one's person may be said to be a right of complete immunity to be let alone." *Matter of Conroy*, 98 NJ 321, 486 A 2d 1209 (1985) quoting Cooley on Torts, 29 and *Union Pac. Ry. Co.* v *Botsford*, 141 U.S. 250, 251, 35 L.Ed. 734, 11 S.Ct. 1000 (1891).

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[1] *Loving* v *Virginia*, 388 US 1, 18 L.Ed 2d 1010, 87 S.Ct. 1817 (1967); *Skinner* v *Oklahoma*, 316 U.S. 535, 86 L.Ed. 1655, 62 S. Ct. 110 (1942); *Eisenstadt* v *Baird*, 405 U.S. 438, 31 L.Ed. 2d 349, 92 S. Ct. 1029 (1972); *Prince* v *Massachusetts*, 321 U. S. 158, 88 L.Ed. 645, 64 S.Ct. 438 (1944); *Pierce* v *Society of Sisters*, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571 (1925); *Meyer* v *Nebraska*, 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1923); *Roe* v *Wade*, *supra* at 152.

In 1914, the esteemed Justice Cardozo also recognized the importance of a right of self-determination, stating: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . ." *Schloendorff* v *Society of New York Hosp.*, 211 NY 125, 129-30, 105 N.E. 92 (1914). Courts have also noted that the "sanctity of individual free choice and self-determination are *fundamental* constituents of life, and the value of life may be lessened rather than increased by the failure to allow a competent human being the right of choice." *Matter of Conroy*, *supra* at 1224, citing *Superintendent* v *Saikewicz*, 373 Mass 728, 370 N.E. 2d at 426 (1977).

Once a fundamental right is established, it does not exist without restraint. Regulation by the state continues even in the area of fundamental rights. The Supreme Court has held when fundamental rights are involved, regulation designed to limit those rights may only be justified by a "compelling state interest." *Roe*, *supra* at 155. This legislative enactment "must be narrowly drawn to express only the legitimate state interests at stake." *Griswold*, *supra* at 485. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v *Button*, 371 U.S. 415, 438, 9 L.Ed. 2d 485,835 S.Ct. 328 (1963).

(*B*)
LIBERTY

Further evidence of the fundamental nature of self-determination lies in the area of liberty. The Fourteenth Amendment "provides that no state shall deprive any person of life, liberty, or property without due process of law". The United States Supreme Court in *Cruzan* v *Director, Mo. Dept. of Health*, 497 U.S. 261, 111 L.Ed. 2d 224, 110 S.Ct. 2841 (1990), acknowledged that a competent person has a constitutionally protected liberty

interest in refusing unwanted medical treatment. *Cruzan, supra* at 278.

While the court in *Cruzan*, cited language indicating the right of self-determination to be a fundamental right, it declined to characterize it as such or apply a balancing test as against that right. The Supreme Court merely declared the right to refuse unwanted medical treatment as a right under liberty which is allowed when clear and convincing evidence of the intent of the incompetent can be shown.

When dealing with the issue of control over an individual's body, historically it has been deemed a fundamental right. The *Roe* court expressly recognized it as such and the *Cruzan* court indicated in dicta that it was fundamental as well. Thus, before a state may attempt to regulate a fundamental right, whether derived from the privacy right of the Ninth Amendment or the liberty rights contained in the Fourteenth Amendment, a state must show a compelling state interest. While it is clear that the right of self-determination is fundamental under the right to privacy and liberty, no appellate court has yet to declare that the right of self-determination can be defined as the right to commit suicide.

However, for purposes of this argument only, let us assume that the right to self-determination includes the right of a competent individual to choose to end his or her own life. The question then becomes: When does the state acquire a compelling state interest in overriding the fundamental right of the individual?

(*C*)
STATE REGULATION

The state has always had and will continue to have an interest in the prevention of suicide. The issue is whether the state's compelling interest lessens or

abates in the case of a terminally ill individual seeking to end his life because of unbearable pain.

To regulate here is to regulate in an area of uncertainty; to protect those who do not wish to be protected, but foremost, to protect those who can not be protected. The inquiry here is whether the state is prolonging a life or prolonging the dying process. If in the opinion of the sufferer "death is not the worst situation you can be in"[2] does the state have the right to override the sufferer's decision to accelerate death by a blanket prohibition?

The distinction between protecting a life and prolonging dying is one which has been addressed in the case law before. The Michigan Court of Appeals stated *In re Rosebush*, 195 Mich App 675, 491 NW 2d 633 (1992), that while the "state has an interest in the prolongation of life, the state has no interest in the prolongation of dying . . ." *Rosebush*, *supra* at 686. Furthermore, the court concluded that "the decision whether to end the dying process is a personal decision for family members or those who bear a legal responsibility for the patient." *Rosebush* at 686. It was also noted by the New Jersey court in the case of *In re Quinlan*, 70 NJ 10, 355 A.2d 326 (1975) that "the State's interest 'weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims.'" The State's interest in the preservation of life is paramount, especially when the bodily invasion is curable but the State's interest loses its powerful stance where "the issue is not whether, but when, for how long, and at what cost to the individual a life may be briefly

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2 See Alida Brill, *Nobody's Business: The Paradoxes of Privacy*, p. 156, quoting the Supreme Court brief filed for Nancy Cruzan's family.

extended." *Superintendent* v *Saikewicz*, *supra* at 742, citing Cruzan, *supra* at 276.

Again, assuming arguendo that an appellate court extends the right of self-determination to include suicide or that the legislature makes that determination on their own, it does not necessariiy follow that the state is without any interest in protecting a terminally ill patient who expresses the desire to end his or her life with the assistance of another.

Clearly, the state has a compelling interest in regulating the assister. There are inherent dangers in allowing a person to assist another in committing suicide. The state has an obligation to ensure that the terminally ill person is not merely overcome by depression, family or financial pressure to end existence. The decision to end life should be evaluated by individuals or commissions who are not seeking financial gain, fame or the furtherance of their own agenda. Proper protocol must be established and enforced. The nature and extent of that regulation is obviously the prerogative of the legislature.

(*D*)
JUS TERTII STANDING

If a terminally ill sufferer has the right to self-determination which may include suicide, the issue then becomes whether that individual has the right to seek the assistance of someone else in carrying out the desire to end life. May a sufferer seek a protected right of assistance in suicide with the assister being immune from prosecution? For that to occur, the assister must be able to assert the fundamental rights of the sufferer.

Dr. Kevorkian contends that, in essence, he derives the rights of the sufferer. Such a conclusion is, in fact, error.

The right of self-determination under the Ninth and Fourteenth Amendments are rights that are specific to the individual. Defendant, to succeed in a challenge under these amendments, must prove constitutional *jus tertii*.[3] He must demonstrate his entitlement to acquire the rights of the sufferer. Three factors must be evaluated to assert jus tertii: 1) the relationship of the litigant whose rights are being asserted, 2) the ability of the person to advance his own rights, *and* 3) the impact of the litigation on third-party interests. *Caplin & Drysdale* v *United States*, 491 U.S. 617, 623, Footnote 3, 105 L.Ed. 2d 528, 109 S.Ct. 2646 (1989). The relationship between Dr. Kevorkian and the decedents in the instant cases was limited at best. The defendant was not the sufferers' *treating* physician. Unlike the physician in *Griswold, supra*, defendant does not have a "special relationship" with his patient.[4] More importantly, Dr. Kevorkian is no longer a physician *licensed* to practice medicine in the State of Michigan.[5]

The second factor the court must evaluate is the ability of the defendant to advance his own rights. Defendant in this action has standing to attack the Michigan statute at issue under the Michigan Constitu-

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[3] Jus tertii: "a party's ability successfully to challenge a law or government action on the ground that it violated third parties' constitutional rights", Robert Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 Cal. L. Rev. 1308 (1982).

[4] The court in *Griswold*, labelled the physician's ability to assert the rights of the patient's as standing, but relied on cases such as *Barrows* v *Jackson*, 346 U.S. 841, 98 L.Ed. 361, 74 S.Ct. 19 (1953) and *Pierce* v *Society of Sisters, supra*. These cases acknowledged the doctrine of jus tertii. Though the court in *Griswold* did not explicitly refer to the three part test, it noted that third parties need to have their rights considered in a suit involving a person who stood in a confidential relationship to them.

[5] As of November 22, 1991, Dr. Kevorkian's license was suspended.

tion. He can and has objected to its form and its scope.

Thus, he has adequate means to challenge the validity of the law without asserting third party rights. He therefore fails to meet the second requirement of jus tertii standing.

With regard to the third factor, the individuals in these cases who may have had a right of self-determination were free to advance their own rights. If the individual has the ability to assert these rights, (and allegedly both suicides in the cases at bar were able to make video tapes before their demise) the court may deny another party from acquiring those rights. To allow otherwise would be to nullify the general rule. "The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." *Singleton* v *Wulff*, 428 U.S. 106, 49 L.E. 2d 826, 96 S.Ct. 2868 (1976).

The Court has followed the analysis of the parties with regard to self-determination with several bold assumptions couching its language in "ifs" and "mays" The issue is of grave import to the jurisprudence of the state and indeed to its citizens.

It was necessary to complete the analysis in order to reach the issue of jus tertii standing. However, because this court has determined that Dr. Kevorkian does not have jus tertii standing, this court is without a justiciable issue to clearly determine the rights of terminally ill sufferers as balanced against the state's interest.

It is therefore the finding of this court that Jack Kevorkian has no entitlement to assert the fundamental right to self-determination of another.

II.
OVERBREADTH AND VAGUENESS

Defendant specifically challenges MCLA 752.1027 on the basis of constitutional overbreadth.[6] This issue must also be decided on the basis of standing.

"For the defendant to have standing to challenge the statute on overbreadth, the statute must be 'overbroad in relation to the defendant's conduct.' One may not constitutionally challenge a statute on grounds of overbreadth against him when the statute clearly applies." *People* v *Green*, 123 Mich App 565, 332 NW 2d, 610 (1983), quoting *People* v *Burton*, 87 Mich App 598, 274 NW 2d 849 (1978).

While there very well may be an argument with regard to the statute's failure to clearly distinguish between active and passive behavior, Dr. Kevorkian's own conduct clearly fits within the statute.

MCLA 752.1027, MSA 28.547(127) provides a criminal penalty for a person who has knowledge of another's intent to commit suicide and then intentionally a) provides the physical means to complete the suicide or b) participates in the physical act. The defendant has publicly admitted to assisting the two suicides that are the subject of the criminal charges now pending against him. Defendant was intentionally present with the individuals at the time of their death and provided the means with which the suicides were accomplished.

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6 A statute is to be invalidated as void for vagueness when it leaves discretion in the hands of the judges, or prosecutors. Generally stated, "the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v *Lawson*, 461 US 352, at 357, 75 LEd 2d 903, 103 S.Ct 18 (1983).

Irrespective of whether the statute covers constitutionally protected acts, as to this defendant, the statute is not overbroad, as his conduct clearly falls within its application. Therefore, his challenge must fail.

III.

EQUAL PROTECTION, DUE PROCESS
& NON-DELEGABLE FUNCTION

This court has thoroughly reviewed defendant's positions with respect to those issues labelled in his brief as equal protection, due process and non-delegable function. The defendant cites no substantive authority for his contentions. Further the court finds that defendant's arguments are not persuasive and, therefore, do not merit further discussion.

IV.

MICHIGAN CONSTITUTION 1963
ARTICLE 4 SECTION 24

Lastly, the defendant asserts that the amendment of House Bill 4501 to include a provision making assisted suicide a criminal offense violates both the title-object and change of purpose prohibitions of the Michigan Constitution 1963, Art. 4, § 24.

Dr. Kevorkian has direct standing to challenge the propriety of the enactment of this law since he is charged under the statute and faces criminal prosecution and the potential loss of liberty.

(A)

TITLE – OBJECT

The Michigan Constitution, Article IV, Section 24, provides that:

> "No law may embrace more than one object, which shall be expressed in its title."

House Bill 4501 (H.B. 4501) was initially introduced on March 7, 1991, to create a commission on death and dying. The bill determined the membership of the commission, their duties and their obligation to recommend to the state legislature any potential legislation dealing with assisted suicide.[7]

There was no provision to criminalize the act of assisting a suicide in any part of the original H.B. 4501. In fact, the bill required the committee to make a recommendation on "the desirability of criminalizing suicide or attempted suicide.[8] Public hearings were held on the bill on December 19, *1991*. However, on November 12, 1992 an amendment[9] was added to the bill which created the felony of assisted suicide. This amendment was added without the benefit of any further hearings. Twelve (12) days later, on November 24, 1992, the amendment was adopted and passed. It went immediately to the State Senate, was passed and was ultimately signed by the Governor on December 15, 1992. The bill was to take effect on March 30, 1993 as 1992 P.A. 270.[10]

The courts of our state have long recognized the title-object provision of the Michigan Constitution which was designed to prohibit "the practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection." *People* v *Mahaney*, 13 Mich 481, 494-5 (1865).

The meaning of "necessary connection" has evolved into two lines of thought. The first is that title object

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7 H.B. 4501, Section 4.

8 H.B. 4501, Section 4(c)(i)(c).

9 Designated as H-4.

10 A subsequent bill SB 211 signed into law as 1993 P.A. 3 advanced the start date to February 25, 1993.

will not be "objectionable so long as it introduces nothing foreign and incongruous, but is confined to the means supposed to be important to the end indicated" *Mahaney*, *id* at 496.

The second line of cases would find the title object rule violated if the "objectionable provision could have been enacted in a separate law without either referring to or supporting the other." *Hildebrand* v *Revco*, 137 Mich App 1, 7; 357 N.W. 2d 778 (1984), Lv. Den. 422 Mich 920 (1985) citing *Kent County, ex rel Bd of Supervisors* v *Reed*, 243 Mich 120; 219 N.W. 656 (1928).

Under either line of thought, it is clear that the title-object provision has been violated in H.B. 4501. The purpose of the establishment of the commission was to *study* issues on death and dying. The establishment of a crime within that same bill is foreign and incongruous.

Although the crime and the commission's study related to the same *subject*, the creation of a crime and the creation of a commission are two distinct objects. It does not follow that a legislature can amend an act designed to educate themselves on the public viewpoint of death and dying by making a conclusion prior to the study. Additionally under the test of *Reed*, *supra*, the felony provision could have been enacted in a separate law. The two objects are not germane to each other.

The prosecutor cites the case of *People* v *Trupiano*, 97 Mich App 416, 296 NW 2d 49 (1980) in support of its contention of constitutionality. In *Trupiano*, the legislature amended an act which would provide for certain crimes to be listed under the Health Code as opposed to the General Penal Code. However, the purpose of the Health Code was to set into codification the various proscriptions and penalties on the use of controlled substances. Its object was to codify and unify those

laws necessary to protect and promote the public health.

It is clear to this court that codification and unification was not the purpose or intention of House Bill 4501.

The purpose of the commission was to study and make non-binding recommendations for potential legislation. The commission was given no regulatory authority. The amendment created an addition to the Michigan Penal Code. It *created* a *felony*. The two objects are not germane to each other. Therefore, 1992 P.A. 270 violates the title-object provision of the Michigan Constitution.

(*B*)
CHANGE OF PURPOSE

The Michigan Constitution also provides at Article IV, Section 24 that:

> "No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title."

Our Supreme Court noted in *Anderson* v *Oakland County Clerk*, 419 Mich 313, 329, 353 NW 2d, 448 (1984), that the intent behind the Change of Purpose provision was "to preclude last minute hasty legislation and to provide notice to the public of legislation under consideration irrespective of legislative intent." H.B. 4501 was initially enacted to create a commission to prepare a study. The public was invited to hearings on the original bill. The November 12, 1992 amendment to H.B. 4501 on the House Floor created a crime. The public was not given notice of the new provision and within a

month[11] H.B. 4501, as amended on the House Floor, became law.[12]

The test for change of purpose is "whether or not the change represented an amendment or extension of the basic purpose of the original or the introduction of entirely new and different subject matter." Anderson, *supra*, citing *United States Gypsum Co.*, v *Department of Revenue*, 363 Mich 548; 110 NW 2d 698 (1961). Under that test, Michigan's Change of Purpose provision has been violated. The original purpose was to create a commission to study a problem; the amendment created a crime, allegedly solving the problem the commission sought to study. These are entirely different purposes.

The question of the validity of H.B. 4501, as amended has been brought before the legislature many times prior to the plethora of litigation. In the Legal Research Division Memorandum of March 27, 1991,[13] the legislature was advised that constitutional violations as well as standing rules of the House may be applicable to find the amendment unconstitutional.

In the House Legislative Analysis Section of H.B. 4501 (Second Analysis) formally released on December 17, 1992,[14] two days after the governor signed the bill into law, it was again argued that this bill might not stand up to constitutional scrutiny.

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11 **The Governor signed H.B. 4501 into law on December 15, 1992.**

12 **1992 P.A. 270.**

13 **See Legislative Service Bureau, Legal Research Division Memorandum by Gary Brian Gulliver, Director of Legal Research, March 27, 1991.**

14 **See House Legislative Analysis Section, House Bill 4501 as enrolled, Second Analysis, December 17, 1992.**

An interim memo issued just 11 days after the amendment of H.B. 4501 (and one day before it was passed in the House) did not speculate on the constitutionality. It *concluded* that:

> "Adding the Palamara-Ciaramitaro Amendments to House Bill 4501 *would violate*, the single-object and change-in-purpose rules of Article IV, section 24 of the Michigan Constitution *as well as* the germaneness requirement of rule 59 of the Standing Rules of the Michigan House of Representatives."[15]

While these legislative memos do not rise to any level of authority, they are cited to indicate that even the legislature's own House Council have serious doubts as to the statute's constitutionality. The prosecution argues that any constitutional infirmities that existed in 1992 P.A. 270 were cured by the enactment of 1993 P.A. 3.[16] He cites *Lahti* v *Fosterling*, 357 Mich 578, 588, 99 NW 2d 490 (1959) in furtherance of his argument:

> "where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there." *Lahti, supra* at p. 588

The problem with the prosecution's argument lies in the definition of amendment. *Black's Law Dictionary* defines "amendment" as a change or modification for the better.[17] 1993 P.A. 3 did not alter, change or modify

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15 **See House Judiciary Committee Memorandum by David Sobelsohn, Counsel, House Judiciary Committee, November 23, 1992.**

16 **See 1993 P.A. 3.**

17 **Black's Law Dictionary – Page 81 (6th Ed. 1990).**

the *text* of 1992 P.A. 270. It merely 1) added the code sections which accompanied the listed acts and 2) moved up the effective date of the law to be effective immediately. These were clearly not substantive amendments.

To allow a defective act to be made suddenly constitutional by such a procedural amendment would negate the purpose of title IV section 24. Additionally the amendments, whether procedural or substantive, simply do not resolve either the title-object or the change of purpose violations.

It is the province of the Legislature to enact laws. Yet their actions must be within the bounds of the Constitution. H.B. 4501 was not enacted in accordance with constitutional procedural requirements as provided by the Michigan Constitution of 1963, Article 4, § 24 and is therefore for the reasons stated herein declared invalid.

CONCLUSION

There are in our society terminally ill individuals whose lives are beset with unbearable pain and agony and who have determined for themselves, and/or with the help of family, a desire to end their pain by ending their lives.

Yet this court recognizes that the concept of aiding and assisting a suicide is fraught with potential danger and abuse.

The issues raised are of grave concern to all of the citizens of the state regardless of their position on the subject. Certainly, the public and the legislature need to address these issues in an atmosphere devoid of hysteria and rhetoric.

The defendant has challenged his prosecution under the assisted suicide statute under both the state and federal constitutions.

This court finds that defendant, Dr. Jack Kevorkian, is without jus tertii standing to assert the privacy and liberty rights of third parties.

The court further declares that Dr. Kevorkian does not have standing to challenge the assisted suicide statute on the grounds of vagueness and overbreadth because his admitted participation comes within the ambit of the statute's prohibitions.

However, with regard to the defendant's challenge to the statute under the Michigan Constitution 1963, Article 4, Section 24, the court finds that the statute violates both the title-object and change of purpose prohibitions of the Constitution and is therefore invalid.

ACCORDINGLY, the cases pending before this court are HEREBY DISMISSED.

/s/ Hon. Jessica R. Cooper

(Certification Omitted)

APPENDIX D

OPINION

(State of Michigan — Circuit Court — County of Wayne)

(Dated December 13, 1993)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, -v- JACK KEVORKIAN, Defendant — Case No. 93-11482; Hon. Richard C. Kaufman)

The defendant, Jack Kevorkian, is charged with violating section 7(1) of 1993 PA 3 (the Act), MCL 752.1027(1). This statute makes it a felony either to provide the physical means or to participate in a physical act by which another person attempts or commits suicide.

Presently before the Court is defendant's motion to dismiss. In this motion it is argued that either the Act generally or sec. 7(1) specifically is unconstitutional for a variety of reasons. For the reasons more fully explained below, however, the Court finds that none of the arguments, save one, posed by defendant have merit, and that as to one of defendant's arguments, a decision is premature, because that issue cannot be decided based upon the existing record in this case. Consequently, defendant's motion is denied as to all his claims, except one claim that is not ripe for decision.

I.

THE ACT DOES NOT VIOLATE CONST 1963, ART 4, § 24

In defendant's motion, it is contended that the Act violates Const 1963, art 4, § 24 because it has more than one object or its original purpose was changed during its passage through the legislature. The Court reviews the former argument initially.

A.

TITLE-OBJECT CLAUSE

Const 1963, art 4, § 24, the so-called title-object clause of the Michigan Constitution, provides in pertinent part:

> *No law shall embrace more than one object*, which shall be expressed in its title. (Emphasis added).

Defendant asserts that the Act violates the single object proviso of art 4, § 24 because it has two purposes, namely, the creation of a commission to study issues relating to suicide and assisted suicide, and the enactment of criminal penalties for certain acts of assisted suicide. In so arguing, defendant notes that the predecessor to the Act, 1992 PA 270, in its original form only provided for the creation of a commission to study issues relating to suicide and assisted suicide, and that criminal sanctions were only inserted by way of amendment. Also, defendant emphasizes that the two purposes of the Act constitute multiple objects because they have no necessary connection. This latter argument is based on language found in case law which, in construing the title-object clause, explains that "the title-object clause is only violated where the subjects are so diverse in nature that they have no necessary connection." *See*, *Builders Square* v *Dept of Agriculture*, 176 Mich App 494, 496-497 (1989). Indeed, as noted by defendant, emphasis on this dicta led another circuit court to find the Act violative of the title-object clause. *See*, *Hobbins, et al* v *Attorney General*, Wayne County Circuit Court, Case No. 93-306178-CZ, Opinion dated May 20, 1993, p 9. In that Opinion, p 10, the Court found the Act violative of the title-object clause because its provisions could have been enacted separately, relying on *Advisory Opinion re Constitutionality of 1975 PA 227*, 396 Mich 123, 133 (1976).

In considering these arguments, it is useful to remember the admonition in *Builders Square*, *supra*, 496:

> It is well established that legislation challenged on a constitutional basis is clothed in a presumption of constitutionality . . . . Every reasonable presumption must be indulged *in favor of an act's constitutionality*. (Emphasis added; citations omitted).

Moreover, as noted in *Kuhn* v *Dept of Treasury*, 384 Mich 378, 387-388 (1971):

> This Court has long and consistently said that art 4, § 24, and similar "one object" provisions in earlier constitutions, are to be construed reasonably "and not in so narrow and technical a sense as unnecessarily to embarrass legislation." *Ryerson* v *Utley* (1868), 16 Mich 269, 277, citing *People, ex rel Drake* v *Mahaney*, (1865) 13 Mich 481, 494.

Thus, the goal of the title-object clause is not to restrict legislation, but rather to prevent the legislature from engaging in the former practice of securing the passage of several diverse measures in a bill, no one of which could succeed on its merits, and to ensure that legislators had notice of the intention and effect of laws considered by them. *Mahaney*, *supra*, 494.

Presently there are several formulas used for determining whether the title-object clause has been violated. In addition to focusing on whether an act contains subjects so diverse in nature that they have no necessary connection or whether the provision could have been separately enacted, see *Advisory Opinion*, *supra*, 396 Mich 131, other decisions inquire as to whether the provisions of an act "directly relate to carry out and implement the principal object." *City of*

Livonia v *Dept of Social Services*, 423 Mich 466, 497 (1985). In this connection, it is well recognized that the object of a law is its general purpose, *Id*, and that a statute may authorize the doing of all things which further its general purpose. *Kuhn, supra*, 387-385 [sic]. Still another line of inquiry asks whether the subjects of the act are wholly foreign or incongruous to each other. *See, Advisory Opinion, supra*, 396 Mich 131-132.

Merely because different provisions of an act could be passed in separate legislation is not sufficient to cause a court to find an act unconstitutional. Indeed, as noted in *Mahaney, supra*:

> To require that every end and means necessary to the accomplishment of [the] general object should be provided for by a separate act relating to that alone, would not only be senseless but would actually render legislation impossible.

Indeed, in *Advisory Opinion, supra*, that the provisions of the act could have been separately enacted was cited as an auxiliary reason or factor for finding a violation of the title-object clause, and not the sole reason. Rather, the Court focused on the substance of the provisions and the extent to which they were diverse or incongruent.

Also, excessive emphasis should not be placed on whether the subjects of an act have a "necessary connection." This phrase first appears in dicta in *Mahaney, supra*, 495, and not as a measure of whether the title-object clause has been violated, but rather the Court's discussion of its purpose. Moreover, in a case decided subsequent to *Mahaney*, the Court found that while there was no necessary connection between the provisions of an act, still the act was not violative of the

title-object clause since, as found by the Court, the connection was a "natural one", and the subjects were germane to each other. *Attorney General* v *Weiner*, 59 Mich 580, 588 (1886). With the foregoing observations in mind, the Court turns to an examination of the Act itself.

The title of the Act provides:

> An act to prohibit certain acts pertaining to the assistance of suicide; to provide for the development of legislative recommendations concerning certain issues related to death and dying, including assistance of suicide; to create the Michigan commission on death and dying; to prescribe its membership, powers, and duties; to prescribe penalties; and to repeal certain parts of this act on a specific date.

Within the Act a commission on death and dying is created whose purpose is to study problems associated with suicide and assisted suicide with a view toward developing recommendations for legislation. Sections 1 through 6 of the Act revolve around the establishment of the commission and its work. Section 7 makes certain forms of assisting suicide a felony.

In reviewing the Act along with its title as a whole, it is evident that the Act has one purpose, namely, to address the subject of suicide and assisted suicide. Certainly germane and not incongruous to this general purpose would be a provision to criminalize certain forms of assisted suicide as well as the creation of a commission to further study the issue. Also, while in a technical sense these two provisions may have no absolute necessary connection to each other, or may have been enacted separately, a narrow or technical application of the title-object clause is to be eschewed. *Kuhn*, *supra*.

Rather, these provisions can be said to have a rational connection to each other in that the Act's criminal provision, whose existence is temporally tied to the work of the commission created by the Act, see MCL 752.1027(5), can be seen by the legislature as a type of moratorium on assisted suicide for a period of time during which more permanent regulatory measures can be considered and enacted. Seen in this light there is a certain natural fit between these provisions of the Act and they can be said to be germane to one another. *Weiner, supra.*

Beyond these considerations, this Court also notes that the underlying purposes of the title-object clause have not been violated. There is no evidence of logrolling. That is, there is no suggestion that the Act is a patchwork of provisions none of which could have been enacted separately. Given that the provisions relating to criminal penalties and the creation of a commission were expressly stated in the Act's title, and the Act itself is relatively short, there can be no argument that the legislators who considered and voted on it did not have notice of the Act's content. Also, at least by the time the Act was passed, its provisions were well publicized. Hence, the purposes of the title-object clause have been satisfied.

Accordingly, for all the foregoing reasons, the Court finds that the Act does not violate the title-object clause of the Michigan constitution.

B.

CHANGE PURPOSE CLAUSE

Defendant also argues that art 4, § 24 was violated because the Act's original purpose was changed by way of amendments. In this connection, the following provision of art 4, § 24 is relevant:

> No bill shall be altered or change its original purpose as determined by its total content and not alone by its title.

Defendant argues that the change purpose clause has been violated because section 7 was added as an amendment to HB 4501 which was enacted as 1992 PA 270. 1992 PA 270 was subsequently amended by the Act (*i.e.*, 1993 PA 3). Defendant's argument here is without factual merit. While it may be that 1992 PA 270 was at least open to the charge that it violated the change purpose clause due to HB 4501 being amended during the legislative process, no such circumstances exist with respect to the passage of the Act. There is no allegation that SB 211, which was enacted as the Act, was subject to any amendments which changed *its* purpose. Thus, while the Act's predecessor may have been open to an attack via the change purpose clause, factually this has no bearing on whether the Act is similarly defective — it is not.

Accordingly, the Court finds that the Act does not violate the provisions of the change purpose clause of the Michigan constitution.

2.

THE ACT DOES NOT PROVIDE FOR AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY

Defendant also argues that the Act's criminal provision contains an unconstitutional delegation of legislative authority in that the determination of the date of the expiration of the criminal provision has allegedly been delegated to a commission. He asserts that Const 1963, art 4, § 1 is thus violated.

Art 4, § 1 provides:

> The legislative power of the State of Michigan is vested in a senate and a house of representatives.

It has been recognized that some legislative powers are simply not delegable. *People* v *Thurman*, 417 Mich 638, 649 (1983). Yet, as explained in *Thurman*, examples of these are to be found in the express provisions of the state constitution. *Id. Thurman* goes on to note that:

> 'many facets of traditionally 'legislative' power [may] be expressed by administrative agencies. Provided that sufficient standards and safeguards . . . are provided . . . .'

In this vein it is well recognized that:

> The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make, its own action depend.
>
> *Florka* v *Detroit*, 369 Mich 568, 575 (1963).

Where a statute contains a standard for determining the fact precedent to a specified action, that statute does not constitute an unconstitutional delegation of legislative power. *Wayne Co Prosecuting Atty* v *Wayne Co Bd of Comm'rs*, 44 Mich App 144, 153 (1972), *lv den*, 389 Mich 768 (1973).

With the foregoing principles in mind, the Court examines the provisions of the Act which are relevant to this portion of defendant's argument.

Section 7(5) of the Act states that:

> This section is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4.

Based on these provisions, defendant asserts that there is an unconstitutional delegation to the commission of

the legislative power to determine when laws cease to be effective since, according to defendant, there is no guarantee when the commission will finish its work. While defendant concedes that, pursuant to section 4(1), the commission is required to submit its recommendations to the legislature "within 15 months after the effective date of the act," and that the Act does provide a date certain as to its effective date (February 25, 1993), see MCL 752.1024, 752.1027, defendant raises the specter that the commission will disregard this time limit and fail to make recommendations within 15 months of the Act's effective date.

There is little doubt that the legislature can lawfully include within an act a sunset provision which indicates when the act expires. *See*, for example, *Ace Tex Corp* v *Detroit*, 185 Mich 609 (1990), *lv den*, 437 Mich 986 (1991). Yet, there is nothing in our constitution which indicates that such a provision is so essential that it cannot be expressed so that the effectiveness of a law would end upon the happening of some event, even if when this occurred was dependent upon the acts of third parties. *Florka*, *supra*.

In reviewing the provisions of section 7 along with those of section 4, it is immediately obvious, contrary to defendant's characterization, that the legislature has set forth certain objectively ascertainable standards for determining when section 7 will expire. While this turns on when the commission acts, the commission's discretion to act is restricted by the legislature. Under section 4(1), the commission must act within 15 months of the effective date of the Act. In recognizing this, the Court rejects defendant's argument that the commission might violate the legislative dictate of section 4. This is based on pure speculation. Moreover, the law presumes that public officials will perform their duty. *Veldman* v *Grand*

Rapids, 275 Mich 100, 113 (1936). There is no evidence before the Court to suggest that the commission will not fulfill its duties in a timely fashion as prescribed in section 4, and it must, therefore, be presumed the commission will do so.

In sum, while the expiration of section 7 is made to turn on certain preconditions, these preconditions are sufficiently definite and the commission's discretion in when it must act is sufficiently limited.

Accordingly, this Court finds that section 7 does not contain an unconstitutional delegation of legislative power.

3.

SECTION 7(1) VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT IS OVERBROAD

> "Questions surrounding the issue of suicide are not simply abstract intellectual puzzles; they are concrete human problems, encountered in many areas of human experience, rooted in human despair, delusion, and pain. But if we sometimes err in failing to see that suicide involves real people in real distress, we may also fail to see that it involves difficult and disputed theoretical issues, upon which depend the resolution of serious practical concerns."
>
> Battin & Mayo, eds, *Suicide, The Philosophical Issues* (1980), p 2.

This brings the Court to Defendant's most significant claim as to why this criminal case should be dismissed. Defendant argues that section 7(1) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides, in pertinent part,

> . . . nor shall any State deprive any person of . . . liberty . . . without due process of law . . .

Defendant argues that the right to terminate one's own life is a fundamental component of liberty protected by the Due Process Clause, especially where a person is terminally ill and in what is perceived by that person to be intolerable pain. Defendant argues that the concept of personal "liberty" embodied in the Due Process Clause protects some decisions to end one's life. Given this, defendant continues, it follows that the ban in section 7(1) on third persons assisting suicide constitutes an undue burden on that right and, hence, is unconstitutional.

This is defendant's most profound claim. Ultimately, the answer to this legal question will go a long way toward determining how our society responds to this controversial issue. At the same time, this Court is quite mindful that it is, at best, no more than a procedural way station on the way to a final legal result.

Nonetheless,[1] this Court acknowledges its awareness of the sensitive and emotional nature of the assisted suicide controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about assisted suicide.

This Court's task, of course, is to resolve the issue by constitutional measurement, free of emotion and of

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[1] **The following *two* paragraphs are a paraphrase from *Roe* v *Wade*, 410 US 113, 116; 93 S Ct 705; 35 LEd 2d 147 (1973).**

predilection. This Court seeks earnestly to do this. As the Court undertakes this task, it bears in mind Mr. Justice Holmes' admonition in his now vindicated dissent in *Lochner* v *New York*, 198 US 45, 76; 25 S Ct 539; 49 LEd 937 (1905):

> "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgement [*sic*] upon the question whether statutes embodying them conflict with the Constitution of the United States."

The constitutional challenge to the statute, under which defendant is criminally charged, involves two distinct inquiries. The first pertains to whether suicide or attempted suicide can ever be considered a component of the liberty interests protected by the Fourteenth Amendment. More precisely put, defendant's argument involves whether there are *any* circumstances under which a person's decision to end their life, and the attempted execution of that decision, is constitutionally protected because it falls within the concept of personal "liberty" embodied in the Fourteenth Amendment. Only if this question is answered affirmatively, does one reach the next question, namely, whether section 7(1) constitutes an undue burden on that right. Accordingly, the Court initially addresses the preliminary question.

The Due Process Clause's protection of liberty places substantive limits on the extent to which government may interfere with those fundamental interests which are encompassed within the term "liberty." As noted by Justice Brandeis in *Whitney* v *California*, 274 US 357, 373; 47 S CT 641; 71 LEd 1095 (1927), ". . . all fundamental rights comprised within the term liberty are protected by the Federal Constitution from the invasion by the

States." The real problem, however, is determining what rights are fundamental to those liberty interests protected by the Fourteenth Amendment. In large part, this involves a question of methodology.

The prosecutor argues that a right cannot be deemed fundamental, and thus entitled to protection through the "liberty" provision of the Fourteenth Amendment, unless it is based upon our Nation's history and tradition. In contrast, the defendant insists that history and tradition can be completely ignored in distilling the existence of a fundamental liberty interest. This Court rejects both approaches.

The prosecutor's view would place a straightjacket upon the Constitution, and not permit it to be the living, dynamic document that has endured for more than 200 years — a document that has guided our society through changing mores and attitudes; a document that permits protection of fundamental liberty and personal privacy, even when history and tradition would severely intrude in these areas. As recently noted by the Court in *Planned Parenthood of Southeastern Pa* v *Casey*, 505 US ___; 112 S Ct 2791; 120 LEd 2d 674, 695-696 (1992), in rejecting the argument that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified:

> But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an

> aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* v *Virgina*, 388 US 1, 12, 18 LEd 2d 1010, 87 S Ct 1817 (1967).

Thus, while historical analysis may have its uses, it cannot be the sole determiner of the question.

Defendant's view is also flawed. It presents an infinitely flexible methodology which would invite judges to constitutionalize any claimed right according to their own private philosophical or religious viewpoints. In rejecting such a position, the Court in *Casey*, *supra*, 120 LEd 2d 697, quoted with approval Justice Harlan's observation in *Poe* v *Ulman*, 367 US 497, 542; 81 S Ct 1752; 6 LEd 2d 989 (1961):

> . . . [I]f the supplying of content to this Constitutional concept has of necessity been a rational process, *it certainly has not been one where judges have felt free to roam where unguided speculation might take them*. The balance of which I speak is the balance struck by this country, *having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive*, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint. (Emphasis added).

Indeed, defendant's approach is mistaken in that it essentially makes the guarantee of liberty in the Fourteenth Amendment "an empty vessel into which this Court is free to pour a vintage" that it thinks "better suits present day tastes." *National Broiler Marketing Assn*

v *United States*, 436 US 816, 827; 98 S Ct 2122; 56 LEd 2d 728 (1978).

Thus, the positions of both the prosecutor and the defendant, standing alone, are flawed. An approach that views these methodologies as separate, but related, is more appropriate and consistent with United States Supreme Court precedent. This point was recently made in *Bowers* v *Hardwick*, 478 US 186, 191-192; 106 S Ct 2841; 92 LEd 2d 140 (1986), where the Supreme Court reviewed the varying ways it has determined whether a certain right was a liberty interest protected by the Federal Constitution:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko* v *Connecticut*, 302 US 319, 325, 326, 82 LEd 288, 58 S Ct 149 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore* v *East Cleveland*, 431 US 494, 503, 52 LEd 2d 531, 97 S Ct 1932 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503, 52 LEd 2d 531, 97 S Ct 1932 (Powell, J.). See also *Griswold* v *Connecticut*, 381 US, at 506, 14 LEd 2d 510, 85 S Ct 1678.

The *Bowers* Court then proceeded to reject as fundamental the claimed liberty interest at issue in that case, and explained:

> Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. *Id*, 478 US 194.

In rejecting the claimed liberty interest at issue in that case, the *Bowers* opinion strongly implies the presence of two connected, but nonetheless, distinct routes, to determine the presence of a fundamental right protected by the "liberty" provision of the Fourteenth Amendment. The first route is to analyze whether the claimed right is "deeply rooted in this Nation's history and traditions." The second route is to consider whether the claimed right is "implicit in the concept of ordered liberty."

Consequently, an analysis of both our Nation's history and tradition and modern views of what is necessary to be implicit in the concept of ordered liberty is required. If both analyses lead in the same direction, the constitutional decision is clear. It is where the two analyses are murky, or lead to inconsistent results, that the correct constitutional decision is difficult to glean.

Further support for this view is found in *Griswold* v *Connecticut*, 381 US 479, 493; 85 S Ct 1678; 14 LEd 2d 510 (1965), where it was stated:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there]" . . . as to be ranked as fundamental.

Here, the Court in almost the same breath requires an analysis of both "tradition" and the present "conscience of our people" to decide a liberty issue.

Also, as noted earlier, in *Loving*, *supra*, a case invalidating miscegenation statutes, the Court reached its result, notwithstanding that at the time of the passage of the Fourteenth Amendment, interracial marriage was barred in most states, by an appeal to history, noting that, "the freedom to marry has long been recognized as one of the vital rights essential to the orderly pursuit of happiness by free men." *Id*, 388 US 12. Implicit, however, in the Court's holding in *Loving* is a rejection of history and tradition which supported such racially-based statutes.

Most strikingly, in *Roe v Wade*, 410 US 113, 129-152; 93 S Ct 705; 35 L. Ed 2d 147 (1993), the Court justified its result, in part, by an appeal to history, noting, during the course of twenty-three pages of historical analysis that,

> [a]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. *Id*, 140.

Many commentators, however, have disputed the *Roe* Court's historical analysis. To the extent that *Roe*'s historical analysis is not totally accurate, the decision is grounded more in a contemporary view of what is "implicit in the concept of ordered liberty."

From the foregoing cases, it can be seen that, in determining what rights are secured by and included in

the concept of liberty, as that term is used in the Fourteenth Amendment, courts have viewed the issue as one that neeessitates both a review of society's past traditions and history, and consideration of the contemporary collective conscience. It is only after such a two-pronged inquiry that a court can reach the conclusion that a practice involves matters so personal or fundamental to one's personhood that they must be seen as part of the liberty protected by the Due Process Clause. Thus, our inquiry must begin by examining whether suicide or attempted suicide under any circumstances can be seen as so "deeply rooted in this Nation's history and tradition", *Griswold*, *supra*, that they must be seen as part of that liberty which is protected by the Fourteenth Amendment.

Preliminarily the Court notes that defendant seeks to limit the historical inquiry to the actions of a terminally ill person who is in intolerable pain. In that situation, defendant argues that the United States Supreme Court not only recognized a person's right to die, but pronounced a constitutional right to obtain assistance in ending one's life. *Cruzan* v *Director, Mo Health Dept.*, 497 US 261; 110 S Ct 2481; 111 LEd 2d 224. (1990)

The *Cruzan* Court held that a person had a right to refuse medical treatment even if this meant that in all probability the person would die. The basis for this holding was not a wide-ranging affirmation of the so-called right to die, but, rather, the common law tort doctrine of informed consent. Moreover, the Court expressly noted that its opinion was limited and that it was "not to attempt, by any general statement, to cover every possible phase of the subject." *Cruzan*, *supra*, 497 US 278. It is significant to this Court that while in Justice Scalia's concurring opinion, *Id*, 251-256, he found no distinction between refusing medical assistance and sui-

cide, this view was rejected, not only in the majority opinion, but also in one of the dissenting opinions.

The *Cruzan* court found no need to go beyond its narrow holding. While there is some logical force behind Justice Scalia's argument that no meaningful distinction exists between failing to do something that causes death, and doing some affirmative act that causes death, it will take a future United States Supreme Court case to cement that logic. In sum, *Cruzan*, while inviting, does not dictate the result of the instant constitutional analysis.

In examining the moral or legal history and tradition of our Country's attitudes, as well as western society's, toward suicide and attempted suicide, the evidence is mixed. There is a plethora of authority supporting the view that history and tradition strongly proscribed suicide and attempted suicide. See, Marzen, *Suicide: A Constitutional Right?*, 24 Duquesne Law Review 1, 17-63 (1985).

The common law in England treated suicide or attempted suicide as a crime with the penalty of ignominious burial and/or forfeiture of property. While this facet of the common law was not adopted in our Country, Marzen convincingly shows that this was not out of a recognition of an affirmative right to commit or attempt suicide, but rather it was rejected as:

> "unsuited to our institutions" because it inflicted punishment on the suicide's innocent family and on an unfeeling corpse, . . . Similarly, as time passed, criminal penalties were rarely imposed on attempts at suicide because the reaction of the populace was one of pity rather than vengeance. Decriminalization occurred because of a concern for the despondency or mental dis-

> order that was believed to prompt such deeds, not because suicide was regarded as a human right. *Id*, 99.

He also shows that, notwithstanding non-criminalization of suicide or attempted suicide, courts have overwhelmingly stated a societal and governmental policy against suicide. Pertinent decisions are found not only in the 19th Century, but well into this century. For example, in *State ex rel Swann* v *Pack*, 527 SW2d.377, 382 (Tenn, 1969) *cert den*, 424 US 954 (1975), the Tennessee Supreme Court said:

> An attempt to commit suicide is probably not an indictable offense under Tennessee law; however, such an attempt would constitute a grave wrong and we hold that the state has a compelling interest in protecting the life . . . of its citizens.

On the other hand, history and tradition, for purposes of constitutional analysis, can be viewed in a much larger context. In *Roe*, the Court's historical analysis began with "ancient attitudes." Just as the *Roe* Court found some support for abortion being freely practiced in Greek and Roman times, there is significant support that historical attitudes toward suicide were not in line with a blanket proscription. The idea that one's honor or one's quality of life would allow society to recognize the act of suicide as not contrary to societal norms has great historical support.

Much of what we know about Greek society supports the conclusion that suicide in many circumstances was acceptable.

> "Plato also allowed for moderation in the other sense. He suggested that if life itself became immoderate, then suicide became a rational, jus-

> tifiable act. Painful disease, or intolerable constraint were sufficient reasons to depart."
>
> ". . . Within a hundred years of Socrates' death, the Stoics had made suicide into the most reasonable and desirable of all ways out."
>
> Alvarez, *The Background*, in Battin & Mayo, *supra*, 7, 19.

These attitudes toward suicide continued during Roman times.

> "The evidence is, then, that the Romans looked on suicide with neither fear nor revulsion, but as a carefully considered and chosen validation of the way they had lived and the principles they had lived by."
>
> ". . . According to Justinian's Digest, suicide of a private citizen was not punishable if it was caused by 'impatience of pain or sickness, or by another cause,' or by 'weariness of life . . . lunacy, or fear of dishonor.' Since this covered every rational cause, all that was left was the utterly irrational suicide 'without cause,' and that was punishable . . ." *Id*, 22.

Presently, the teachings of mainstream Christian and Judaic faith find suicide anathema. Yet, Alvarez points out that this was not always the case:

> "The idea of suicide as a crime comes late in Christian doctrine, and as an afterthought. It was not until the sixth century that the Church finally legislated against it, and then the only Biblical authority was a special interpretation of the Sixth Commandment: 'Thou shalt not kill.' The bishops were urged into action by St. Augustine; but he, as Rousseau remarked, took

his arguments from Plato's *Phaedo*, not from the Bible.'" *Id*, 12-13.

Alvarez indicates that when the Christian Church decided to adopt a prohibition on suicide it had a difficult time in supporting this new position on the basis of the Scriptures:

> "They also reflect the difficulty the church had in rationalizing its ban on suicide, since neither the old nor the New Testament directly prohibits it. There are four suicides recorded in the Old Testament — Samson, Saul, Abimelech and Achitophel — and none of them earns adverse comment. In fact, they are scarcely commented on at all. In the New Testament, the suicide of even the greatest criminal, Judas Iscariot, is recorded as perfunctorily; instead of being added to his crimes, it seems a measure of his repentance. Only much later did the theologians reverse the implicit judgment of St. Matthew and suggest that Judas was more damned by his suicide than by his betrayal of Christ. In the first years of the Church, suicide was such a neutral subject that even the death of Jesus was regarded by Tertullian, one of the most fiery of early Fathers, as a kind of suicide." *Id*, 12.

Although theologically rooted in the concept of the sanctity of life, the change in Christianity's attitude toward suicide was, as Alvarez persuasively argues, primarily motivated by practicalities. He explains that the cult of martyrdom led to a rapid increase of actual suicide in the name of religion. In order to preserve its numbers the early Church needed to stop this practice:

> "Viewed from the Christian Heaven, life itself was at best unimportant; at worst, evil: the fuller the

> life, the greater the temptation to sin. Death, therefore, was a release awaited or sought out with impatience. In other words, the more powerfully the Church instilled in believers the idea that this world was a vale of tears and sin and temptation, where they waited uneasily until death released them into eternal glory, the more irresistible the temptation to suicide became. Even the most stoical Romans committed suicide only as a last resort; they at least waited until their lives had become intolerable. But for the primitive Church, life was intolerable whatever its conditions. Why, then, live unredeemed when heavenly bliss is only a knife stroke away? Christian teaching was at first a powerful incitement to suicide." *Id*, 25.

As can be seen from this historical analysis, attitudes towards suicide in western civilization evolved with radical changes.

> "An act which during the first flowering of Western civilization had been tolerated, later admired, and later still sought as a supreme mark of zealotry, became finally the object of intense moral revulsion. When, in the late Renaissance, the question of the individual's right to take his own life once more arose, it seemed to be challenging the whole structure of Christian belief and morals. Hence the deviousness with which men like John Donne began once again to argue the case for suicide after a gap of more than a thousand years." *Id*, 29.

In the last hundred years or so, the grip of the Church's blanket prohibition against suicide has begun to ease.

> "The shift is from the individual to society, from morals to problems. Socially, the gains were enormous: the legal penalties gradually dropped away; the families of successful suicides no longer found themselves disinherited and tainted with the suspicion of inherited insanity; they could bury their dead and grieve for them in much the same way as any other bereaved. As for the unsuccessful suicide, he faced neither the gallows nor prison but, at worst, a period of observation in a psychiatric ward; more often, he faced nothing more piercing than his own continuing depression." *Id*, 30.

Recognition of these historical attitudes of western civilization toward suicide appears in *Roe*. In *Roe*, *supra*, 410 US 132 the Court wrote,

> . . . only the Pythagorean school of philosophers frowned upon the related act of suicide.

The *Roe* Court goes on to determine that the Pythagorean school was a minority view,

> and "[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity."
>
> Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130-200) "give evidence of the violation of almost every one of its injunctions." But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in

> agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct." *Id*, 132.

It is striking that so much of the historical analysis of the *Roe* Court with respect to abortion mirrors historical traditions with respect to suicide.

The foregoing review of our Country's history and tradition does not reflect an unequivocal result, but one that is murky. While it may be that the view which proscribes suicide or attempted suicide currently predominates, nevertheless there is significant support in our traditions and history for the view approving suicide or attempted suicide. An appeal to history and tradition, thus, cannot determine the result of this constitutional question. Rather, the Court must proceed to determine whether the right to commit suicide or attempt suicide is ever part of the implicit concept of ordered liberty.

Thus, this Court must turn its analysis to the question of whether the implicit concept of ordered liberty as described by the United States Supreme Court in various cases necessariiy includes some protection under some circumstances for a person's decision to end their life.

In giving substance to this prong of the analysis, this Court is guided by the description of what sorts of concerns are included in those interests that are implicit in the concept of ordered liberty, found in *Casey*, *supra*, 698,

> *These matters* involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and

> autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. (Emphasis added).

At oral argument the prosecutor contended that this passage was not relevant to our case simply because its introductory phrase "[t]hese matters" referred to a class of cases, cited immediately before this paragraph, which involved personal decisions concerning marriage, procreation, contraception, child rearing or educational choices. *Id*, 698. True, our case involves none of these interests per se. Nevertheless, the broad language of the paragraph is useful to our analysis in that it gives a general description of what sort of particular interests the Court has in the past determined to be implied in the concept of ordered liberty.

In viewing the problem in the light of the foregoing language found in *Casey*, there can be little doubt that the decision to commit suicide involves an intimate and personal choice, and given the nature of the decision certainly ranks among the most important that a person may make concerning one's own being. As succinctly put by the Court in *Cruzan*, *supra*, 281,

> The choice between life and death is a deeply personal decision of obvious and overwhelming finality.

In this Court's view, therefore, the decision to commit suicide, at least under some circumstances, can be deemed to be implicated in the concept of ordered liberty.

Yet, analyzing the problem through the prism of the personal interests at stake is not the sole factor. Another necessary component of the equation is the interest of the state. *Casey*, *supra*, 710. Indeed, as explained in *Casey*, it was precisely the state's interest in preserving life that led the Court in *Roe* to formulate the trimester approach to determining the character of a woman's right to obtain an abortion, *Id*, 711, and which also guided the Court's analysis in *Casey*, *supra*, 714. It is significant that under this analysis, depending on the strength of the state's interest, the state could under some circumstances proscribe abortion altogether. Thus, in our case, it is appropriate to examine the state's interest in proscribing suicide or assisted suicide.

The most frequently stated interest of the state in proscribing suicide, attempted suicide or assisted suicide is the state's interest in preserving life. As Chief Justice Rehnquist stated in *Cruzan*, *supra*, 282,

> "... [W]e think a state may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."

So, clearly, the state has a recognizable interest in preserving life. It is equally clear, however, that this state interest is not absolute, and cannot insulate all state action from constitutional scrutiny. As explained by Chief Justice Rehnquist, this state interest must "be weighed against the constitutionally protected interests of the individual."

As a result, we see places in the law where this state interest must take a back seat to other protected rights.

In *Cruzan* the common law doctrine of informed consent, and a person's liberty right to refuse medical treatment, afforded constitutional protection to the individual notwithstanding the state's interest in preserving life.

This state interest in preserving life is certainly a sufficient justification for the state to proscribe attempted suicide under many, if not most, circumstances. The question remaining is whether this state interest is sufficient to proscribe attempted suicide under all circumstances. The obvious issue that arises at this point is the tension between this state interest in preserving life and the interest of a person whose quality of life is so poor that all reasonably objective observers would, at a minimum, sympathize with that person's desire to end their life.

Although some cases have suggested that the state interest in preserving life should be blind to the quality of life, a number of cases suggest that the state's interest in preserving life does have a qualitative component. *Cruzan*, again, is such a case. More to the point is *Buck* v *Bell*, 274 US 200; 47 S Ct 584; 71 LEd 1000 (1927). In that case, the United States Supreme Court upheld a state statute that required the sterilization of certain women. The Court found that the state in that case had a sufficient interest to avoid the creation of certain life because the state concluded the quality of such life was too low and too much of a burden on society to permit. As a result of this decision of the United States Supreme Court, one could fairly ask, if the state is allowed to prevent the creation of life because it deems the resulting quality too low, how can it deprive a person of the right, under certain circumstances, to come to that same conclusion with respect to their own life?

Consequently, the state interest in preserving life is important, but must be balanced against the constitutionally protected interests of the individual.

The state's interest in preserving life was given a more concrete defense in the area of suicide in a recent well-written article. Kamisar, *Are Laws Against Suicide Unconstitutional?*, 23 Hastings Center Report 32 (1993). Professor Kamisar argues that the state interest in preserving life allows the state to proscribe all attempted suicide, even attempted suicide that Professor Kamisar would find to be a rational act. He argues that the social sanctioning of rational suicide and assisted suicide will lead to an increase in irrational suicide. In support of this contention, Professor Kamisar writes,

> How likely is it that the social sanctioning of "rational" suicide and assisted suicide will lead to an increase in "irrational" suicide and assisted suicide? In a suicide-permissive society, how often will the "right" to commit suicide and the "right" to enlist the assistance of others in this enterprise be interpreted, especially by the most vulnerable, as the "duty" to do so? In a suicide-permissive society, how often will a burdensome, elderly relative not otherwise desirous of death be "helped along or pressured or manipulated" into suicide? *Id*, 40.

Certainly, if it is true that, by permitting rational suicide, the frequency of irrational suicides will increase, the state may possess a strong justification for proscribing all attempted suicides.

Professor Kamisar, however, offers no support for this causal connection. Couldn't one as effectively claim that by drawing a clear legal line between rational suicide and irrational suicide, the stigma of committing irra-

tional suicide would increase? Couldn't one as effectively argue that by establishing tight procedures to regulate the commission of rational suicide, a person who otherwise would have committed irrational suicide will embark on the procedures for lawful rational suicide, and, thereby, not only be prevented or dissuaded from committing irrational suicide, but receive professional treatment in the process?

The claim that drawing a line between acceptable and unacceptable conduct will increase the frequency of unacceptable conduct is far from clear. Most commentators now believe that the failure in the fifties and sixties to draw more meaningful lines between marijuana and harder illegal drugs contributed to the increased use of both. It is just as probable that the failure of the law to draw a meaningful line between rational and irrational suicide will increase the frequency of irrational suicide.

The resolution of this struggle between the state's proper interest in preventing irrational suicide, and the claimed liberty interest in allowing persons the right to commit rational suicide, comes down to the law's ability to draw a meaningful, enforceable, legal line that will make it clear where any given conduct falls. This appears to be the crux of the issue because it does not appear supportable to claim that the law by describing with care an area of rational suicide that is constitutionally protected, and the legislature proscribing all other irrational suicide, would lead to more irrational suicide than we presently have.

The fact that suicide can be a rational act is intuitive to some, but not obvious to all. A convincing discussion supporting the view that suicide can be a rational act is found in Brandt, *The Rationality of Suicide*, in, Battin & Mayo *supra*, 117. Professor Brandt sets the stage for his analysis:

"The problem, I take it, is a choice between future worldcourses: the world-course which includes my demise, say, an hour from now, and several possible ones which contain my demise at a later point. We cannot have precise knowledge about many features of the latter group of world-courses. One thing I can't have precise knowledge about is how or when I shall die if I do not commit suicide now. One thing is certain: it will be sometime, and it is almost certain that it will be before my one-hundredth birthday. So, to go on the rational probabilities, let us look up my life expectancy at my present age from the insurance tables, making any corrections that are called for in light of full medical information about my present state of health. If I do not already have a terminal illness, then the choice, say, is between a world-course with my death an hour from now, and several world-courses with my death, say, twenty years from now. The problem, I take it, is to decide whether the expectable utility to me of some possible world-course in which I go on for another twenty years is greater than or less than the expectable utility to me of the one in which my life stops in an hour. One thing to be clear about is: we are not choosing between death and immortality. We are choosing between death now and death some (possibly short) finite time from now.

. . .

We compare the suicide world-course with the continued life world-course (or several of them), and note the features with respect to which they differ." *Id*, 119.

Professor Brandt then sets focus on the rationality of a sick person deciding to commit suicide.

> "We always have to live by probabilities, and make our estimates as best we can. People sometimes argue that one should not commit suicide in order to escape the excruciating pain because a miraculous cure for one's terminal disease might be found tomorrow. And it is true that such a cure could, as a matter of logical possibility, be found tomorrow. But if everyone had argued in that way in the past hundred years, all of them would have waited until the bitter end and suffered excruciating pain; the line of argument that ignores probabilities and demands certainty would not have paid off in the past, and there is no reason to think it will pay off much better in the future." *Id*, 122.

Professor Brandt concludes this discussion by stating,

> "Let us not pursue the question whether it is rational for a person with a painful terminal illness to commit suicide; obviously it is." *Id*, 123.

Professor Brandt then goes on to assess whether suicide can be a rational act even for one who is not suffering from a painful terminal physical illness.

> "If we look over a list of the problems that bother people, and some of which various writers have regarded as good and sufficient reasons for ending life, one finds (in addition to serious illness) things like the following: some event which has made one feel ashamed or has cost one loss of prestige and status; reduction to poverty as compared with former affluence; the loss of a limb or physical beauty; the loss of sexual capacity; some event which makes it seem impos-

> sible that one will achieve things by which one sets store; loss of a loved one; disappointment in love; the infirmities of increasing age. It is not to be denied that such things can be serious blows to one's prospects of happiness." *Id.*

Professor Brandt then discusses the serious pitfalls that may be present when one ponders suicide based upon these reasons.

> "Most suicides which are irrational seem to be suicides of a moment of despair. What should be clear from the above is that a moment of despair should be, if one is seriously contemplating suicide, a moment of reassessment of one's goals and values, a reassessment which the individual must realize is very difficult to make objectively, because of the very quality of his depressed frame of mind." *Id*, 127.

With respect to suicide by a non-physically ill person Professor Brandt, finally, concludes with little conviction.

> "A decision to commit suicide may in certain circumstances be a rational one. But a person who wants to act rationally must take into account at least the various possible "errors" mentioned above and make appropriate rectifications in his initial evaluation." *Id*, 128-129.

By acknowledging the existence of "irrational" suicide, as that term is described in Professor Kamisar's and Professor Brandt's article, this Court also acknowledges, and concludes without great difficulty, that based upon the state's proper interests, there are circumstances where a person's decision to end their life, and the attempted execution of that decision, are not constitutionally protected, and could be proscribed by the state.

The two easiest examples are attempted suicide by a child or incompetent person who suffers from no objective debilitating physical illness. These types of suicides would probably be placed at one end of the continuum labeled irrational suicide. At the other end of the continuum, labeled rational suicide, would be the suicide of a competent adult who has an objectively verifiable terminal illness and who, as a result of that terminal illness, suffers from significant, substantial, and continuous agony, and objective medical analysis confirms that any alleviation of this discomfort is extremely unlikely prior to death.

Consequently, given the tenuous nature of the state's justifications for proscribing all forms of attempted suicide, this Court is convinced that if an adequate, meaningful line can be drawn between rational and irrational suicide, the liberty provision of the Due Process Clause protects a person's decision to commit rational suicide.

In pondering the continuum from irrational to rational suicide, it is difficult to draw a precise line. However, the societal debate seems to focus on several key issues: quality of life, competency, free choice, objective findings, permanency of condition. Based on these concepts, this Court concludes that a clear, meaningful and enforceable line can be drawn between rational and irrational suicide, in order to describe that area of attempted suicide that is constitutionally protected as being implicit in the concept of ordered liberty.

In drawing this line one of the most difficult issues is the one raised by the prosecutor at oral argument, to wit: If a person has a liberty interest in making an unfettered rational decision to commit suicide, when they have some objective medical condition that they believe makes life not worth living, how can you not extend that liberty interest to competent adults who have the

same attitude about their life, but do not have objective medical findings to support their desires? The prosecutor's argument continues, that if this personal decision is protected by the liberty provision, as a matter to which the state may not interfere, how can we deprive such competent adults of this right to make this decision?

The answer to this dilemma is found in the state's appropriate and compelling interest in preventing irrational suicide. If a line was drawn that did not require the presence of objective medical findings, the possibility that irrational suicide would increase is too great, since any form of rational suicide that did not include the presence of an objective medical condition would be too close to irrational suicide.

A state in implementing a compelling interest that restricts a fundamental right, must draw such a statute as narrowly as possible to express only the legitimate state interests at stake. *Roe, supra*, 410 US 155. This Court concludes that in drawing such a statute as narrowly as possible in order to adequately proscribe irrational suicide, a state may proscribe attempted suicide by competent adults where no objective medical condition is present.

Accordingly, this Court finds that when a person's quality of life is significantly impaired by a medical condition and the medical condition is extremely unlikely to improve, and that person's decision to commit suicide is a reasonable[2] response to the condition causing the quality of life to be significantly impaired, and the decision to end one's life is freely made without undue

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[2] The concept of "reasonable" is well known in our common law tradition. It is an objective legal concept. The state retains the right to establish an objective process to determine in this context what is reasonable and what is not.

influence, such a person has a constitutionally protected right to commit suicide.

The recognition of this right, however, does not remove the state's right to legislate in this area. A court decision recognizing a right of privacy or liberty must also acknowledge that some state regulation in areas protected by that right is appropriate.

> The willful termination of life requires controlled conditions, an appropriate environment, qualified persons, competent consultation and unequivocal informed consent.
>
> Bloom, *Letter to Editor*, The Detroit News, November 26, 1993.

State regulation in all these areas to insure that the bright line between "rational" and "irrational" suicide is maintained, is not only permissible, but desirable.

To return to section 7(1) in our case, however, the state has proscribed assistance to all suicides. Thus, the Court lastly addresses the question of whether the blanket proscription unduly burdens a person's right to commit rational suicide. The concept of whether a state regulation unduly burdens this exercise of a constitutional right has most recently been applied in the abortion cases. To paraphrase the explanation given in *Casey, supra*, 714-715, a finding of undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a person seeking to exercise a protected liberty interest, and is therefore invalid.

Thus, this Court must consider the impact upon a person's liberty interest in committing rational suicide, if the state is permitted to proscribe assistance for all forms of attempted suicide.

> It is reasonable to assume that many, if not most, physicians accept the fact that under specifically defined conditions the alternative to life serves the best interest of the patient, the surviving family and society.
>
> Dr. Bloom, *supra*.

Why do physicians accept that fact? The answer lies somewhere in contemporary attitudes about personal dignity and autonomy, the quality of life, happiness, and the meaning of life. If what Dr. Bloom stated is true with respect to most physicians, one cannot escape the conclusion that most physicians believe[3] that the proper parties to sort out these weighty issues are the patient, the patient's family, and the patient's doctor — not the state. The litany of the impact upon a person and their family if the state is permitted to proscribe "rational" suicide is, probably, both obvious and unnecessary. It is hard to imagine a state action that would have a greater intrusive effect upon a person's quest to make personal decisions based upon their personal moral beliefs, than the state's blanket proscription of assistance of rational suicide.

Accordingly, this Court finds that section 7(1) is unconstitutional as being overbroad with respect to a person's liberty interest in committing rational suicide. The question remains, however, whether this defendant has the requisite standing to ask this Court to strike down section 7(1) as being unconstitutional on the basis of overbreadth.

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3 According to *Quiet Voices Amid the Furor*, Detroit Free Press Magazine, November 14, 1993, p 6, many physicians act on this belief.

4.

WHETHER THIS DEFENDANT HAS STANDING TO CHALLENQE SECTION 7(1) ON OVERBREADTH IS NOT RIPE FOR DECISION

The doctrine of overbreadth is primarily applied to First Amendment situations where an overbroad statute prohibits constitutionally protected conduct. *People* v *McCumby*, 130 Mich App 710, 714 (1983), *lv den*, 419 Mich 911 (1984). In the absence of First Amendment rights, constitutional challenges based on overbreadth or vagueness must be examined in the light of the case's particular facts. *People* v *Green*, 123 Mich App 563, 565 (1983). In *Green*, *supra*, 565-566, the Court further explained:

> Furthermore, for defendant to have standing to challenge the statute on overbreadth the statute must be "overbroad in relation to defendant's conduct. One may not constitutionally challenge a statute on grounds of overbreadth against him when the statute clearly applies." *People* v *Burton*, 87 Mich App 598, 601; 274 NW2d 849 (1978). Defendant's hypotheticals for both constitutional attacks present some interesting problems. However, defendant's conduct clearly fits within the statute . . . . Whatever else the statute may or may not cover, it applies here. As such, defendant has no standing to argue either constitutional issue.

In the case at bar, defendant makēs no claim that any First Amendment rights are at issue. Consequently, in order for this defendant to have standing to challenge the unconstitutional overbreadth of this statute, he must show that the person he is alleged to have assisted committed rational suicide. The existing record in this case is inadequate to make this determination. Therefore, an evidentiary hearing must be held to

determine whether this defendant has standing. Because it is unclear at this time whether defendant has standing to challenge his prosecution under an application of section 7(1) deemed by this Court to be unconstitutional, a decision regarding whether the statute is unconstitutional is premature.

Accordingly, defendant's argument that section 7(1) violates the Due Process Clause does not warrant the granting of his motion to dismiss unless and until the record establishes the standing of this defendant.

5.

SECTION 7 DOES NOT DENY EQUAL PROTECTION

Defendant lastly argues that section 7 violates the equal protection clause of the Fourteenth Amendment.[4] He argues in his Brief, p 16, that section 7 violates equal protection since "different classes of persons are treated in different fashion without any rational basis thereof."

Posing the issue this way, however, leads to the conclusion that no violation of the equal protection clause has been shown. As explained in *Brody* v *Moan*, 551 F Supp 443, 448 (SD NY, 1982):

> "Constitutional principles of equal protection do not require that all persons be treated identically." . . . "The essence of equal protection is that persons similarly situated with respect to challenged government action shall be treated similarly." . . . The Supreme Court has explained that "The Constitution does not require things which are different in fact . . . to be treated in

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4 **US Const, Am XIV states in pertinent part:**

> **No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.**

> law as though they were the same." (Authorities omitted).

Defendant's argument, however, is posited on what he characterizes as different treatment for different classes. Framed as such he cannot show a denial of equal protection.

Moreover, the example given by defendant to show why the statute denies equal protection is based on an erroneous reading of the statute. Substantively, he argues that the statute denies equal protection because, whereas under *Cruzan* a comatose person would have the right to refuse medical treatment, and, in fact, to have food withheld from him or her, a conscious patient could not exercise this right if his or her purpose was to die. The latter situation is not violarive of section 7. Nothing in the statute requires a person to accept life saving measures, including feeding. Notably, subsection 2's excepting from the reach of subsection 1 the withholding or withdrawal of medical treatment does not turn on intent. Compare subsection 3. Thus, the decision by a conscious person to refuse medical treatment and a doctor's compliance with this request could not be punished under the statute.

Because the substantive basis of defendant's equal protection argument is fundamentally flawed, the conclusion he wishes the Court to make cannot be drawn.[5]

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[5] Defendant also argues that section 7 violates the Due Process Clause because it is arbitrary and capricious. These arguments, which also involve a substantive due process challenge to the statute, see *Sinola Lake Owners Assn* v *City of Simi Valley*, 882 F2d 1388, 1407 (CA 9, 1989), need only be resolved if it is ultimately found that this case does not involve "rational suicide" and, hence, implicates no liberty interest protected by the Due Process Clause. Finally, this Court rejects the prosecutor's argument that the Court of Appeals' stay of proceedings in another case in any way bears on this Court's ability to decide any issues that may come up in this case.

Accordingly, this Court finds that section 7 does not violate the equal protection clause of the Fourteenth Amendment.

ORDER

At a session of the Court held in the City-County Building, Detroit, Wayne County, Michigan, on this: DECEMBER 13, 1993.

PRESENT: HON. RICHARD C. KAUFMAN,
Circuit Judge.

The Court being fully informed in the premises and for the reasons stated in the foregoing Opinion,

IT IS ORDERED that defendant's motion to dismiss is DENIED as to all his constitutional challenges except that based upon Due Process.

IT IS FURTHER ORDERED that as to the Due Process challenge, this matter is set for an evidentiary hearing on January 6, 1994, to determine whether this defendant has standing to attack the statute as overbroad.

/s/ RICHARD C. KAUFMAN
Circuit Judge

(*Certification Omitted*)

APPENDIX E

OPINION

(State of Michigan — Circuit Court — County of Oakland)

(Dated July 21, 1992)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, -v- JACK KEVORKIAN, Defendant — CASE NO.: CR-92-115190-FC; HONORABLE DAVID F. BRECK)

SYLLABUS

(Not to be interpreted as part of this Court's Opinion)

The Defendant was indicted by a Grand Jury on three counts, two counts of Open Murder and one count of Delivery of a Controlled Substance. After a preliminary examination, the Defendant was bound over to this Court to stand trial on the Open Murder charges. The Defendant then moved this Court to dismiss the charges. At the same time, the Prosecutor appealed the examining court's decision to dismiss the controlled substance charge. This Court took both matters under advisement after oral argument. The following is a summary of the Opinion.

Count I on the Information charged the Defendant with Open Murder in the death of Marjorie Wantz. Mrs. Wantz had been suffering from horrible pain in her lower abdominal area. She had traveled with her husband to numerous specialists seeking relief. She underwent 9 or 10 surgeries and had contemplated having her spinal cord cut. After enduring the pain for as long as she could, Mrs. Wantz contacted the Defendant, who over two years discouraged her from suicide and referred her to Southeastern Michigan Hospice for pain relief. However, her pain was continuous, excruciating and could not be relieved by the treatment given at hospice.

Count II of the Information involved the death of Sherry Miller. In 1978 or 1979, Ms. Miller was diagnosed with multiple sclerosis. By 1989 she was confined to a wheelchair. 1991 found her confined to a bed or a wheelchair, without the use of her legs or her right arm,

only limited use of her left arm, and having problems talking and breathing. She decided to commit suicide and contacted the Defendant for his assistance. As with Mrs. Wantz, Defendant initially discouraged her from suicide and referred her to a psychiatrist.

The two women were brought to a secluded cabin by family members and/or close friends. The Defendant connected Mrs. Wantz to his "suicide-machine" and Ms. Miller to a canister of carbon monoxide. The latter device was activated by Ms. Miller and it is inferred that Mrs. Wantz activated the "suicide-machine", because the Prosecutor failed to prove Defendant activated it. After the woman died, Defendant notified the police.

The first issue addressed by the Court was whether physician assisted suicide is a crime in Michigan. *People* v *Roberts*, a 1920 Michigan Supreme Court decision, was similar in some respects to the instant case and that case held assisted suicide to be murder. However, that case has been criticized by numerous lower courts. Therefore, the Opinion (in Part A of Question I) discussed the issue, after concluding that *Roberts* no longer constitutes the law in Michigan, and ruled assisted suicide is not a crime, based on *People* v *Campbell*. Part B concluded that *Roberts* still represents the law in Michigan, but that Dr. Kevorkian's acts are distinguishable from the act of Frank Roberts due to the physician-patient relationship between the two women and the Defendant. The Court applied the right to die caselaw to physician assisted suicide after concluding that no valid distinction could be drawn between disconnecting life support equipment and connecting equipment designed to cause death when activated by the patient. The patient's right to control medical treatment and self-determination out-weighed any state interest involved. Thus, under Part B the Court ruled physician assisted suicide is not criminal. Under either analysis, the Court concluded that assisted suicide (whether physician assisted or layman assisted) is not a crime in Michigan.

In Question II, the Court concluded that the Defendant was not properly bound over on the Open Murder charges. Regarding Mrs. Wantz, in order to bind a defendant over for trial, the Prosecutor must establish the corpus delicti. The components of the corpus delicti are a dead body and evidence that the death was the result of the criminal act of another. Due to the Court's finding that physician assisted suicide is not a crime, the Prosecutor failed to establish the second component of the corpus delicti as to Mrs. Wantz.

Furthermore, the district court judge erroneously ruled that there was no testimony as to how Ms. Miller died. In fact, the testimony clearly showed Ms. Miller activated the carbon monoxide device, and therefore the most that was established was that Defendant assisted her. Once again, because physician assisted suicide is not a crime, the Defendant was wrongly bound over. Therefore, the Court granted Defendant's Motion to Quash as to both murder counts.

Question III addressed the Prosecutor's argument regarding the applicability of MCLA 750.505. The Court ruled this statute does not apply.

The Prosecutor's appeal of the dismissal of the controlled substance charge is discussed in Question IV. The Court concluded that a showing of "bad faith" is a necessary element of the charge as applied to physicians. The District Court found no bad faith and properly dismissed this charge.

Question V discussed the propriety of the Grand Jury and the Indictment. After reviewing the briefs submitted by the parties at the Court's request, the Court concluded that the Grand Jury properly heard the arguments and delivered a valid Indictment. Furthermore, any defects which may have existed were cured by the subsequent preliminary examination.

The Defendant raised numerous allegations of prosecutorial misconduct. These are discussed in Question VI. The Court concluded the allegations are unsubstantiated by any evidence.

Finally, the Court questioned the need for Legislative action, although noting several judges as well as the Oakland County Prosecutor have called for legislation. The Court suggested that the Michigan Medical Society, with input from the State Bar of Michigan, could address this issue. In the meantime, the Court requested Dr. Kevorkian to refrain from further counseling.

All charges against Dr. Kevorkian were dismissed. However, the Court invited appeal and requested the doctor to refrain from further counseling until the issue can be resolved. The Court also encouraged the medical profession to make more use of hospice treatment so that fewer people will consider suicide.

Respectfully submitted,

/s/ Judge David F. Breck
July 21, 1992

OPINION AND ORDER

(State of Michigan — Circuit Court — County of Oakland)

(Dated July 21, 1992)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, -vs- JACK KEVORKIAN, Defendant — CASE NO: CR-92-115190-FC, 92-DA-5303-AR; HON. DAVID F. BRECK)

At a session of said Court, held in the Courthouse, in the City of Pontiac, County of Oakland, State of Michigan, on the 21st day of July, 1992.

INTRODUCTION

The Defendant, Jack Kevorkian, M.D., was indicted by the Grand Jury on two counts of Open Murder (MCLA 750.316) relating to Marjorie Wantz and Sherry Miller, and one count of Delivery of a Controlled substance to Marjorie Wantz, to wit Methohexital (Brevital), a schedule IV controlled substance in violation of MCLA 7401(1), (2)(c); 333.7218(1). After a preliminary examination before Judge James Sheehy, the Defendant was bound over to stand trial on the open murder charges, and the Delivery of a Controlled Substance charge was dismissed. The Defendant has filed a motion to dismiss Counts I and II, and the Prosecutor has appealed the dismissal of Count III.

The preliminary examination testimony established that both Ms. Marjorie Wantz and Mrs. Sherry Miller were living lives of horrible desperation, both had contemplated suicide for a long period of time, and when they contacted Dr. Jack Kevorkian as a physician to give his aid in dying, he initially attempted to dissuade them from ending their lives.

William Wantz, Marjorie Wantz's husband, was called as a prosecution witness and testified that he traveled

to the Cleveland Clinic to seek advice about management of his wife's pain (115 to 116). Her medical records were furnished to Defendant (142). In 1990 she went into Sinai Hospital for surgery (143), but there was an effort (presumably by officials at Sinai) to commit her because she was suicidal (144). A doctor there did tell her suicide was one of her options (146). Eventually, a Kalamazoo state institution determined she was mentally competent (151). Her pain was in the vaginal area (164), and was not psychological (166). She even asked to have her spinal cord cut to stop the pain, but the physician at Cleveland Clinic advised there was no assurance that would eliminate the pain (167).

Besides the Cleveland Clinic, Mrs. Wantz contacted "numerous other places in the United States and nobody said they could do any good for her", including Mayo Clinic, University of Indiana, where the examiner said, "I've never seen anybody this bad" (206), Detroit doctors, and the University of Michigan (167). Her medication was four times stronger than morphine. (168)

In response to Mr. Fieger's questions, Mr. Wantz also testified that Mrs. Wantz took her own life after years of agonizing pain, and only after undergoing nine or ten surgeries on her vagina (170). Further, he testified that for years his wife would scream from the pain and needed sleeping pills at night (172).

Despite her desire to commit suicide due to her constant pain, Dr. Kevorkian tried to dissuade her from suicide (173). He referred her to Cleveland, and suggested acupuncture and hypnotism, Defendant also referred her to Dr. Finn at Southeastern Michigan Hospice for her pain, even though he knew that Dr. Finn did not subscribe to Defendant's position regarding physician assisted suicide. (174)

After medication failed, Dr. Finn's prognosis was "pain, pure and simple . . . that all the medicine he gave her wasn't taking care of it. His statement to me was it would be better off to be cancerous, at least in six months you might be dead" (meaning Mrs. Wantz) (175). She concluded finally that suicide was her only way out, because no one could cure her pain (176). It was so bad even wearing her panties hurt her. She could rarely leave home, and when she rode in a car she had to lay down in the back seat (177). Mrs. Wantz described the vaginal pain as "like sitting on a bonfire all the time" (178). Ultimately, after unsuccessfully trying to shoot herself (190), Mrs. Wantz wrote Exhibit L in which she said after three and one-half years, she could no longer go on with the pain and agony, only leaving the house to go to the doctor. She begged Dr. Kevorkian for two years. Her last thirteen months were spent living in "pure hell". She concluded, "No doctor can help me any more. If God won't come to me, I'm going to God. Can't stand it no longer". (187)

As for Sherry Miller's condition, Sharon Welsh testified for the prosecution that Ms. Miller was diagnosed with multiple sclerosis in 1978 or 1979 (p. 224). Around 1983 she was dragging one leg and then started using a cane (228), she "continually deteriorated", and went to a walker. Then her father carried her from place to place and in 1989, she went into a wheelchair, but she had to be put into it. (231) A couple of years before talking about Defendant, Ms. Miller said she wished she were dead (232). In the spring of 1990 she wrote a letter to Dr. Kevorkian and spoke to him on the telephone (233). Ms. Miller told Mrs. Welsh that she felt she was becoming a burden on people (235). By 1991 she was either confined to a bed or a wheelchair, did not have use of her legs and her right arm, only limited use of her left arm and had problems talking and breathing

(236), and said she probably would have to go into a nursing home, although she did not want to (237).

In response to Mr. Fieger's questions, Mrs. Welsh testified that Ms. Miller's father had to put her on the toilet, that her food had to be cut into small pieces and that she was getting rapidly worse (276). Due to the lack of joy in her life, she decided to commit suicide and contacted Dr. Kevorkian as a physician to assist her. For a number of years he encouraged her to seek treatment for multiple sclerosis and see a psychiatrist (278). When she made the decision to proceed, her siblings and parents supported her decision (288), as well as her psychiatrist (or psychologist) (293).

QUESTION NUMBER ONE: IS ASSISTED-SUICIDE A CRIME IN MICHIGAN?

A. "*CAMPBELL*" IS THE LAW

It is basic to our criminal law system that the public be advised of what behavior constitutes a crime. *People* v *Wiegand*, 369 Mich 204 (1963). As stated in *People* v *Llewellyn*, 401 Mich 314, 328 (1977):

> "It is a long-standing rule in this state that criminal statutes must establish with reasonable certainty the elements of the offense so that all persons subject to their penalties may know what acts it is their duty to avoid."

There being no statute relating to suicide, the Court must look to the common law.

The first known Michigan case to address this issue is *People* v *Roberts*, 211 Mich 187 (1920). In that case the defendant, at his wife's request, placed poison within reach of his wife who had expressed an intent to commit suicide because she had incurable multiple

sclerosis. She drank the poison and died. Defendant was charged with murder under C.L. 1915, Section 15192, which in pertinent parts is identical to MCLA 750,316, and he pled guilty. Two issues presented themselves: What degree of murder was he guilty of (the judge determined it to be first degree) and whether there was "evidence of the commission of the crime charged". The court very clearly ruled that Defendant was guilty of murder by poisoning, and in Section Two of the Opinion rejected the defense that assisted suicide was not a crime.

Sec. 2 of *Roberts* was entirely dictum in view of the fact that Mr. Roberts pled guilty to open murder. Having once done that, the only issue before the judge, pursuant to 3 Comp Laws 1915, Sec. 15194 (now cited as MCL 750.318), was to determine whether defendant was guilty of first or second degree murder. Under Michigan law, the only question to be resolved upon a plea to open murder is whether the accused's guilt is of the first or second degree. *Berry* v *Mintes*, (D.C. 1981) 529 FSupp 1067, affirmed 726 F2d 1142, certiorari denied 467 US 1245, 104 SCt 3520, 82 LEd 2d 828. Thus, as stated before, the second portion of the *Roberts* opinion was dictum. Furthermore, the *Roberts* opinion has been attributed very limited scope: "Proceedings to determine the degree of guilt.are not necessariiy to be regarded as a trial (*People* v *Marsh*, 14 Mich App 518, f.n. 1 at p. 522)

People v *Quicksall*, 322 Mich 351 (1948) is often cited as the second in the trilogy of Michigan assisted suicide cases. However, the defense of assisted suicide was never raised, the defendant actually shot the victim in a failed suicide pact, and the main issue was ineffective assistance of counsel. Therefore, *Quicksall* is not relevant to this case.

The only other appellate court case in Michigan is *People* v *Campbell*, 124 Mich App 333 (1983). At page 337 the court said:

> "We are not persuaded by Defendant's attempts to distinguish this case from *Roberts*, *supra*.
>
> We now consider whether the *Roberts* case still represents the law of Michigan and we find that it does not. Recent cases of our Supreme Court cast doubt on the vitality of the 1920 *Roberts* decision.[1]
>
> The *Roberts* case, without discussion, assumed that a murder had occurred and considered only the degree of that crime" (Page 337).

The *Campbell* court went on to define homicide:

> "Homicide is the killing of one human being by another . . . homicide is not a crime. In this state it is 'murder' and 'manslaughter' that are crimes . . . The term suicide excludes by definition a homicide." (Page 338)

The *Campbell* court concluded that defendant was not guilty of murder even though he incited the deceased to kill himself and provided the gun. That decision only makes sense, because common logic dictates that if suicide is not a crime (and it is not in Michigan), then someone who assists should not be criminally responsible. In this case, if the women triggered the devices (even though installed by Defendant), they would have committed suicide and a homicide would not have occurred.

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[1] This may be a veiled acknowledgment that the Court of Appeals cannot reverse the Supreme Court. If in fact the Supreme Court made decisions casting doubt on *Roberts*, then perhaps the *Campbell* court did not violate the rule of *People* v *Heard*, *infra*.

A question has been raised as to whether *Campbell* is an assisted suicide case or limited to an incitement to suicide case. The latter would be a grievous matter, and yet the court dismissed the case against Mr. Campbell. However, this Court is satisfied that the opinion is intended to cover assisted suicide as well. Not only is *Roberts* included in the opinion, but also the statutes referred to from other states all involve assisted suicides.

In *Campbell* the prosecutor sought leave to appeal to the Michigan Supreme Court and leave was denied. The prosecution cites *Clink* v *Steiner*, 162 Mich App 551, 413 NW2d 45 (1987), where the court held, pursuant to MCR 7.321, that a denial of an application for leave to appeal has no precedential value "in and of itself". However, each application for leave to appeal must satisfy the grounds set by MCR 7.302(B). In *Campbell* only subparagraph (5) could have been applicable:

> (B) *Grounds.* The application must show that
>
> "(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or .another decision of the Court of Appeals; or . . ."

Analysis of MCR 7.302 (B)(5), as applied to *Campbell*, reveals that the Supreme Court was satisfied that no clear error existed in the Court of Appeals ruling that would cause material injustice, nor did the decision materially conflict with a Supreme Court decision or any decision of the Court of Appeals. Thus, while the reasons for denial of leave to appeal may not be regarded as precedent, the denial itself reflects the appellant's failure to meet the grounds required by MCR

7.302(B), thereby making the Court of Appeals decision the binding adjudication.

While an honest comparison with *Campbell* and the instant case leads one to recognize that the facts in the latter are greatly disparate and the instant case much more akin to *Roberts*, nevertheless the *Campbell* court rightly stated, on page 339:

> "The common law is an emerging process. When a judge finds and applies the common law, hopefully he is applying the customs, usage and moral values of the present day."

How does one determine today's values, as they relate to assisted suicide? While certainly not exhaustive on this subject, the following indicators are helpful:

A. Recorders Court Judge Justin C. Ravitz demonstrated great prescience in *People* v *Slaughter* (No: 81-59442), where he dismissed a manslaughter charge against Mr. Slaughter who assisted his wife's suicide. Judge Ravitz, in 1982, found *Roberts* to be not controlling, and in doing so, said:

> "law is not static . . . the law is a breathing, living dynamic tool that's supposed to be consistent with serving the more noble objectives of human kind, and I dare say that our attitudes and our sensitivities to the tragic subject of this litigation have hopefully grown since 1920" (which is when *Roberts* was decided).

B. Three separate lower court judges have ruled that *Roberts* is not controlling. In *People* v *Adkins*, District Court Judge Gerald McNally ruled that *Roberts* is "flawed", indicating that the trial judge's hands were tied because Roberts pled guilty to murder. He then concluded that *Campbell* overruled *Roberts*. This Court

notes that the Prosecutor advances no valid reason for not appealing that decision.

In addition, District Court Judge James Sheehy ruled that *Roberts* is inapplicable to the instant case.

When the Wayne County Prosecutor prosecuted *People* v *Harper*, Recorder's Court No. 90-10081, the jury acquitted Mr. Harper even though he had actually tied the bag over his wife's head, which then caused her death by asphyxiation. Thus, a Michigan jury found Defendant not guilty, even in a case which appeared to involve active euthanasia. In that case, Recorders Court Judge Isidore B. Torres instructed the jury that if they found Defendant only assisted suicide, then he would be not guilty (See transcript attached).

To conclude this portion of the Opinion, *Campbell* held assisted suicide, whether physician assisted or not, is legal (and *Roberts* is not controlling). Obviously, legalized assisted suicide is plagued with problems, including: "unauthorized euthanasia by family members of incapacitated patients, or even judgment calls made by health professionals based on the cost-effectiveness of treatment for certain terminal patients. In addition, the potential civil liability for doctors who assist in an unsuccessful suicide attempt is considerable" {Wayne Law Review, Vol 37, p 1921, 1949 (1991)}. However, these same problems exist in right-to-die cases, and have been effectively addressed.

B.

"*CAMPBELL*" IS NOT THE LAW

It could also be argued that section two of the *Roberts* decision is not dictum. This argument is premised on the fact that a person cannot plead guilty to something which is not a crime. As stated in *People* v *Hammond*, 187 Mich App 105 (1991);

> "We hold that a plea of guilty of a nonexistent criminal offense is similar to the examples . . . in which the state never had a legitimate interest in securing a conviction. Accordingly, despite the plea bargain, the defendant may appeal and allege the illegality of his plea-based conviction of a nonexistent offense.
>
> For these reasons, we conclude that the lower court abused its discretion in failing to grant defendant's motion to withdraw his plea of guilty of conspiracy to commit second-degree murder" *People* v *Hammond*, at 113.

This principle was in effect in 1920 when the opinion in *Roberts* was rendered. *People* v *Utter*, 209 Mich 214 (1920).

While one limited exception did exist to this principle, when the guilty plea is the result of a plea bargain {see *People* v *Hooper*, 58 Mich App 132 (1975)}, the exception did not apply to *Roberts*. There is no indication that the plea in *Roberts* was the result of a plea bargain agreement.

The defendant in *Roberts* claimed that he had pled guilty to the non-existent crime of assisting a suicide. Such a claim survives a guilty plea due to the absence of a state interest in securing such a plea. *People* v *Hammond*, *supra*. Therefore, the Supreme Court's discussion in Section Two of whether a crime was committed was necessary to decide the case. If the Court had found assisting a suicide was not a crime, the conviction would have been set aside and the case dismissed. Section Two of the *Roberts* opinion is not dictum and the Supreme Court of Michigan determined that Mr. Roberts' act of assisting his wife's suicide constituted the crime of murder under the common law. The applic-

able statute fixed the degree of murder, which was accomplished by poison, as first degree murder.

The Defendant argues that *People* v *Campbell*, *supra*, effectively overruled *Roberts*. This is incorrect for two reasons. First, and most obvious, the Court of Appeals is not able to overrule a Supreme Court decision. *Hardy* v *Maxheimer*, 149 Mich App 236 (1986). Since *Roberts* was the opinion of the Supreme Court, the Court of Appeals was bound by the decision. Second, the *Roberts* opinion involved the interpretation of the common law offense of murder. Since Michigan does not statutorily define murder, the offense is defined pursuant to the common law. "The common law prevails except as abrogated by the Constitution, the Legislature, or the Supreme Court." *People* v *Heard*, 103 Mich App 571 (1981). Pursuant to *Heard*, the Court of Appeals lacked the power to abrogate the common law as announced in the *Roberts* opinion. Therefore, the *Campbell* decision had no effect on the Supreme Court's decision in *Roberts*.

The *Roberts* case is distinguishable from the instant case, however. In this case, the defendant is a doctor who was acting in the course of a physician-patient relationship (and this Court so holds, based upon the lower court testimony). This distinction does not compel a reversal of prior common law, because this Court has not been referred to any other physician assisted suicide cases, and our[2] research has failed to discover any. (There are no reported cases convicting a physician of aiding, abetting, or assisting a suicide", Wayne Law Review, supra, at 1932) In fact, when Dr. Timothy Quill

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[2] The Court takes this opportunity to credit his legal researcher, Mark S. Roberts, Esq. for his tireless devotion to this case. His insight, perseverance, and legal acumen greatly contributed to this Opinion.

wrote in the New England Journal of Medicine (324 New England Journal of Med, 691, 1991) that he assisted "Diane" commit suicide, he was never prosecuted and the New York State Health Department decided to not even charge him with professional misconduct. (Harvard Law Review, June, 1992, at p. 2024). Thus, in this respect, this is a criminal case of first impression at the Circuit Court level.

It is commonly accepted law that patients have the right to insist they be removed from life support systems, even though to do so will hasten their deaths. *Cruzan* v *Director, Missouri Department of Health*, 497 US ___, 110 S Ct 2841, 111 LEd 2d 224 (1990) and many cases cited therein. If a person can refuse life sustaining treatment, then that person should have the right to insist on treatment which will cause death, providing the physician is willing to assist and the patient is lucid and meets rational criteria. While the interests of the State are different when suicide is involved, it appears to this Court that nevertheless the prevailing interest should be the constitutionally protected interests of the individual.

The distinction between assisted suicide and the withdrawal of life support is a distinction without merit. But for the doctor's act of disconnecting the life support system, or the act of inserting the I.V. needle, death would not have occurred. "There is no morally important difference . . ." (Harvard Law Review, *supra*, footnote 69).[3] Dean Sheldon F. Kurtz, Dean and Foundation Pro-

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[3] **Readers are urged to read the entire essay in the foregoing Harvard Law Review, because the author addresses the role of the courts in assisted suicide cases, based on the following postulation:**

> **"Despite claims to the contrary, courts created exceptions to laws against 'aiding suicide' when they permitted patients to demand withdrawal of life-sustaining treatment. When life-sustaining care is withdrawn, patients are, in some sense, committing suicide and physicians are, in some sense, assisting them. Because this type of physician assisted sui-**

(*concluded on page A-219*)

fessor of Law, Florida State University College of Law, concurs:

> "Permitting the administration of a life-terminating drug, if intended by the patient, is morally indistinguishable from commonly accepted practices of withholding or withdrawing life-sustaining technologies, including food and hydration, from a terminally ill patient, an action that will also result in death."
>
> (American Medical News, Jan. 7, 1991, p. 13)

In *Cruzan, supra*, the court differed on whether Missouri could decree the standard of proof required to determine the patient's wishes (clear and convincing evidence, the majority ruled). While Justice Scalia, in dictum, seemed to admonish against assisted suicide, none of the Justices differed with the following views:

(1) "choices about death touch the core of liberty... not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to *individual conscience*" (emphasis added), at 4937, by Justice Stevens, in his dissenting opinion.

(2) Justices Brennan, Marshall and Blackmun, in their dissent, concurred that:

> "It is 'a well-established rule of general law . . . that it is the patient, not the physician, who ultimately decides if treat-

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(*continued from page A-218*)

cide has been legalized, there is no objective reason why courts cannot create exceptions in similar cases that involve lethal injections and prescription drugs" page 2030.

> ment — any treatment — is to be given at all . . . . The rule has never been qualified in its application by either the nature or purpose of the treatment, or the gravity of the consequences of acceding to or foregoing it'" *Tune* v *Walter Reed Army Medical Hospital*, 602 FSupp 1452, 1455 (DC 1985). See also *Downer* v *Veilleux*, 322 A2d 82 (Me 1974) ("The rationale of this rule lies in the fact that every competent adult has the right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks, however unwise his sense of values may be to others")." Page 4927.
>
> "Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence. 'In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve.' *Brophy* v *New England Sinai Hospital, Inc.*, 398 Mass 417 434, 497 NE2d 626, 635-636 (1986)". Page 4929.

This Court notes that the analogy to right-to-die cases is not limited to terminal patients. In Washtenaw County, Michigan, {*In Re Blodgett* (83-26514-AZ)} a non-terminal quadriplegic, who was even able to operate a motorized wheel chair, was allowed to be removed from his portable ventilator because his quality of life was unbearable. That was also the result in *Bartling* v *Superior Court, et al.*, 209 Cal Rep 220, 1984.

On page four of Judge James Sheehy's Opinion he has an appropriate quote:

> "The right to die is an integral part of our right to control our own destinies so long as the rights of others are not affected. That right should . . . include the ability to enlist assistance from others, including the medical profession, in making death as painless and quick as possible . . . If there is ever a time when we ought to be able to get the government off our backs it is when we face death — either by choice or otherwise", Quoting Associate Justice Compton's concurring opinion in *Bouvia* v *Superior Court*, 179 Cal App 30. 1127, 225 Cal Rptr 297,307 and 308 (Cal App 2 Dist 1986), review denied (June 5, 1986).

Thus, it is this Court's conclusion that physician assisted suicide is not a crime in Michigan, even when the person's condition is not terminal.

QUESTION NUMBER TWO

DID THE MAGISTRATE ABUSE HIS DISCRETION BY BINDING DEFENDANT OVER ON TWO COUNTS OF OPEN MURDER?

The district court judge stated, "No testimony was presented as to who activated the two death devices" (page 7 of his Opinion). This statement is inaccurate as the transcript reveals that Sharon Welsh testified that Ms. Miller pulled the screw driver which caused the flow of carbon monoxide to commence (Page 279, lines 18 & 19 and page 267 lines 3-18). Therefore, as to Ms. Miller, the district court opinion is factually erroneous.

Thus, this Court finds the district court abused its discretion in binding the Defendant over on Count II (Open Murder) involving the death of Ms. Miller. The district court failed to consider the unrefuted testimony

presented which indicated Ms. Miller took her own life. Therefore, the only basis to bind the Defendant over on this count would be the Defendant's assisting in Ms. Miller's suicide, which this Court has determined is not a crime in the State of Michigan. The Defendant's Motion to Quash is granted as to Count II.

With regard to Mrs. Wantz, the district court's opinion is also incorrect. A review of the transcript reveals no direct testimony that Mrs. Wantz pulled the strings that activated the "machine". The testimony of Mr. Wantz indicates that only the Defendant, his sister and the two decedents were present when the machine was activated. (page 152, lines 19-23, also p. 160 lines 13-23). When asked if the Defendant activated the machine, Mr. Wantz replied, "To my knowledge, no." (Page 185, lines 12-14)

However, Mr. Wantz further testified that Mrs. Wantz was trying to pull the string when he left the room (page 194 lines 15 & 16). After he left, he heard Defendant say, "Marj, you have to hold your hand up" (Page 194, lines 17-21). It may be concluded from this testimony that Mrs. Wantz was having difficulty activating the machine. Two inferences may be drawn from that testimony. First, Mrs. Wantz was eventually able to activate the machine, ending her life. Second, and equally plausible, Mrs. Wantz was incapable of activating the machine, so it was activated for her by someone who was in the room, ending her life. The issue then becomes whether this last inference is sufficient to support the bind-over.

In *People* v *Meyer*, 46 Mich App 357 (1973), a similar issue was presented. In that case, the defendant was charged with manslaughter. The cause of death was "pulmonary edema and was caused by probable drug intoxication". The defendant had made statements to

the police that while she held the victim's arm, a co-defendant injected the victim with heroin. (This was done at the victim's request due to her inability to hit a vein.) The case was bound over.

The defendant's Motion to Quash the Information was denied. Defendant appealed the denial of her motion, arguing that there was insufficient evidence at the preliminary examination, absent her confession, to establish the corpus delicti. The court then stated the components of the corpus delicti in a homicide case are a dead body and evidence that the death was the result of the criminal act or agency of another. *Meyer* at 363.

The court ruled:

> "The proffered medical evidence established (1) the absence of barbiturates, (2) the presence of quinine, which indicated the presence of morphine, (3) the existence of needle marks, one of recent origin, (4) anatomic changes associated with the patient diagnosed as pulmonary edema, and (5) the absence of a preexisting disease or natural illness. This combination of factors, including circumstantial evidence, was sufficient to establish the unnatural character of the death but creates no reliable evidence of another person's criminality. *Without more, these facts are as consistent with a theory of accident or self-injection by the deceased as a theory of criminality.*" (emphasis added) *Meyer* at 363-364.

The court then began to discuss whether the defendant's statements could be used to establish the corpus delicti. However, the above quoted passage indicates that where two equally plausible inferences may be drawn from the evidence presented, one establishing the corpus delicti, one negating it, then additional evidence is required to support a bind-over decision.

In the instant case, as stated before, there exist two equally plausible inferences which may be drawn from Mr. Wantz's testimony. One which would establish Mrs. Wantz injected herself and one establishing the criminal act of Defendant or his sister injecting her. This being the case, additional evidence was required in order to support the bind-over. There is no direct testimony in the record to establish that Mrs. Wantz died due to a criminal act.

This Court has not overlooked the fact that Dr. Dragovic lists the manner of death as "homicide" (323) on the death certificate. This Court rejects the medical examiner's definition of homicide, which equates assisted suicide and homicide *(Campbell, supra,* 338). The act of a physician assisting a suicide is not a criminal act. Therefore, the manner of death listed on the death certificate does not establish the second element of the corpus delicti.

Thus, this Court finds the district court abused its discretion in binding the Defendant over on Count I (Open Murder) involving the death of Mrs. Wantz.

The Motion to Quash is granted, and Counts I and II are hereby dismissed.

QUESTION NUMBER THREE

THE APPLICABILITY OF MCLA 750.505
PUNISHMENT FOR INDICTABLE COMMON LAW OFFENSES

The Prosecutor contends that if this Court determines that assisting a suicide is not murder, then the Defendant may still be prosecuted for the common law crime of assisting a suicide, even though neither the Grand Jury Indictment nor the Information contain this charge. MCLA 750.505, according to the Prosecutor, would apply as it provides punishment for common law offenses for which no punishment is expressly provided. It states:

750.505. Punishment for indictable common law offenses

Sec. 505. Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $ 10,000.00, or both in the discretion of the court."

Historically, assisting a suicide fell within the common law definition of murder. *Michigan's "Uncommon Law" of Homicide*, 7 Cooley Law Review (1990). In Michigan, MCLA 750.316 and .317 provide the punishment for murder using the common law definition of murder. Therefore, any act defined as murder under the common law is properly prosecuted under MCLA 750.316 and .317. As the statutes have expressly provided punishment for those crimes defined as murder by the common law, MCLA 750.505 does not apply. Also, it does not apply because physician assisted suicide was not a crime at common law.

QUESTION NUMBER FOUR

PROSECUTOR'S APPEAL FROM DISMISSAL OF COUNT III (DELIVERY OF A CONTROLLED SUBSTANCE)

The Prosecutor has appealed the district court's decision not to bind the Defendant over to Circuit Court for trial on Count III, Delivery of a Controlled Substance, in violation of MCLA 333.7401. That statute states, in pertinent part:

"*333.7401. Unlawful manufacture, delivery, or possession with intent to manufacture or deliver; unlawful dispensing, prescription or administration; penalties*

> Sec. 7401. (1) Except as authorized by this article, a person shall not manufacture, *deliver, or possess with intent* to manufacture or *deliver, a controlled substance*, a prescription form, an official prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not *dispense*, prescribe, or *administer* a controlled substance for other than *legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner*, licensee, or applicant." (Emphasis added)

Our Court of Appeals set forth the standard to be used in determining whether a physician's actions were in the course of his professional practice or research. It stated:

> "The standard required in determining whether the physician's actions were in the course of professional practice or research is whether the doctor made an "honest" or "good faith" effort to treat and prescribe in compliance with an accepted standard of medical practice." *People* v *Downes*, 168 Mich App 484, 488 (1987)

The Court then cited the following footnote from *People* v *Alford*, 405 Mich 570 (1979):

> "In *Moore* the United States Supreme Court noted that: The jury was instructed that Dr. Moore could not be convicted if he merely made 'an honest effort' to prescribe for detoxification in compliance with an accepted standard of medical practice. *People* v *Downes*, *supra*, at 488.

The *Alford* court also ruled, "An 'honest effort' or good faith compliance is the standard required in deter-

mining whether the physician's actions were in the course of professional practice or research." *Alford*, at 589.

In the instant case the district court, in refusing to bind Dr. Kevorkian over on the delivery charge, stated:

> "The People have failed to establish the elements of Count III, Delivery of Controlled Substance. Dr. Kevorkian did not prescribe drugs in this case; he used drugs. The use of drugs was the instrumentality of the death process. The doctor did not act in bad faith nor did he traffic in drugs. (Trafficking in drugs is defined as the passing of goods or commodities from one person to another for an equivalent in goods or money.) Count III is therefore dismissed." (Judge Sheehy Opinion at page 8)

This Court finds that there was sufficient testimony in the lower court establishing a physician-patient relationship with both women.

There was testimony at Dr. Kevorkian's preliminary examination by Dr. DeKornfeld that the manner in which Defendant used Brevital was not an accepted medical practice. However, more importantly, he also testified that there are "physicians who support physician assisted suicide as a legitimate medical practice" (496). Further, there was no proof that the Defendant acted in bad faith, and that is what Judge Sheehy ruled. Thus, there was an element of the crime missing, because according to *People* v *Alford*, *supra*; *US* v *Moore*, 423 US 122, 96 SCt 335, 46 LEd 2d at 333, 348 and *People* v *Downes*, *supra*, "the standard required in determining whether the physician's actions were in the course of professional practice or research . . ." is whether Defendant acted in good faith or made an honest effort to comply *(Downes*, *supra*, at 488).

In *Downes*, there was testimony that the defendant did not comply with good medical practice. In fact the *Downes* court found "the record in this case establishes departures from accepted standards of medical practice . . ." and noted the physician witness did not speculate as to the defendant's motives. Therefore, the court found that there was a missing element in the preliminary exam; namely, the good or bad faith of the defendant and the case was dismissed:

> "The evidence at the preliminary examination established that Defendant's actions were not good medical practice. There was no proof, however, that Defendant acted in bad faith." (page 488)

Certainly from Mrs. Wantz's viewpoint, Defendant was acting in good faith by responding to her request for this use of Brevital to end her life.

As there was testimony that physician assisted suicide is a legitimate medical practice, Judge Sheehy correctly required proof of bad faith. There being none shown on the record, Judge Sheehy did not abuse his discretion in dismissing Count III.

Thus, the Prosecutor's appeal is denied.

QUESTION NUMBER FIVE
GRAND JURY ISSUES

The parties, at the Court's request, briefed the issue of whether the Grand Jury which indicted Defendant was properly empowered to hear the case. The petition to seat the Grand Jury stated that it is necessary to investigate "unsolved homicides, attempted homicides, and additional narcotics investigations". The order empaneling the Grand Jury ordered it to "investigate unsolved murders, the illegal possession, distribution, manufac-

turing, and/or delivery of controlled substances, and conspiracies or attempts to commit these offenses". Since the instant case does not constitute an unsolved murder, it is argued the Grand Jury, as limited by the order creating it, was powerless to indict the Defendant.

The issue of Grand Jury irregularity was addressed in *People* v *Reigel*, 120 Mich 78 (1899). In that case the defendant argued that the judge failed to follow the procedures for empaneling the jury. Due to this defect, the defendant moved to quash the indictment. That motion was denied.

In its opinion affirming the denial of the motion, the Supreme Court stated:

> "A grand jury assembled under color of law is a de facto grand jury, and an indictment found by such jury cannot be attacked upon the ground that it was not found by a lawfully constituted jury, but that the proceedings of such a jury are valid, the same as are those of a court presided over by a de facto judge." *Reigel*, at 86.

Pursuant to *Reigel*, the fact that the instant grand Jury may have acted outside the order by which it was created will not invalidate the indictment.

In addition, the Court notes that the Defendant also had the benefit of a second probable cause hearing, the preliminary examination. Any technical defects in the indictment were cured by the examination. The Court finds that any irregularity regarding the Grand Jury proceedings does not mandate a dismissal of the case.

QUESTION NUMBER SIX
PROSECUTORIAL MISCONDUCT

The Defendant argues that he is entitled to a dismissal of all charges due to the misconduct of the Oak-

land County Prosecutor's Office. It is first argued that the Defendant's rights were violated by the improper conduct of the Prosecutor before the grand Jury. It is stated that the Defendant was called before the grand jury knowing that he would invoke his fifth amendment right and decline to answer. The Prosecutor, knowing this, continued to question the Defendant for one half hour.

As noted in the Court's discussion in Question Five, any impropriety in the grand jury proceedings was cured by the preliminary examination. Additionally, the "impropriety" the Defendant referred to is not so serious as to require a dismissal of the charges. The Defendant was adequately represented by counsel and did in fact assert his right to refuse to answer the questions. Any prejudicial affect was remedied by the subsequent preliminary examination.

The Defendant next argues that the press conference in which a summary of the grand jury testimony was revealed was improper. This conference was held after the Defendant was arrested, however. The matter was sealed until the Defendant's arrest. Once again, any impropriety in the grand jury procedure was remedied by the preliminary examination.

The final points raised by Defendant require little discussion. The Supreme Court has already addressed the alleged investigation of Judge Sheehy, who presided over the preliminary examination. Given the Supreme Court's response and the fact that no supporting evidence was presented, this Court finds no merit to Defendant's argument on this issue. There are other avenues of recourse available to Defendant.

Finally, regarding the alleged assault upon the Defendant's attorney and witnesses, this Court again notes the

total lack of any substantiating evidence. Therefore, the dismissal of the case against Defendant is not required by the Defendant's allegations of prosecutorial misconduct.

QUESTION NUMBER SEVEN
IS THERE A NEED FOR LEGISLATION?

Almost ten years ago the *Campbell* court urged the Legislature to take action, and noted "no Legislature has classified such conduct as murder" (p. 340). Oakland County Prosecutor Richard Thompson, as well as other Michigan prosecutors, have encouraged legislative action. Judge Gerald McNally in his *Atkin's* Opinion, as well as Judge James Sheehy in his Opinion, recognized the need for legislation. Even now our Legislature is struggling with the issue of whether to make assisted suicide a crime and the Michigan Medical Society is wisely urging the appointment of a commission to address the issue, prompted by the concerns of many physicians questioning the wisdom of making assisted suicide a crime.

This Court is uncertain whether legislation is the answer. Perhaps it is best to leave the solution to the Michigan Medical Society and the State Bar of Michigan.

CONCLUSION

While this Court has found that the physician assisted suicide in this case is not a crime in Michigan, the prevalence of suicide can be kept to a minimum if doctors can be educated about, and the public be made aware of, the benefits of hospice. Many times a patient's pain can be relieved and the dedicated volunteers, nurses, physicians and staffs can help the patient die in comfort and assist the family in their grief, thereby obviating the desire to commit suicide.

It must be recognized, though, that there are some people with intractable pain that cannot benefit from hospice treatment ("The Physician's Responsibility Toward Hopelessly Ill Patients", *The New England Journal of Medicine*, March 30, 1989, p. 844 at 847). For those patients, whether terminal or not, who have unmanageable pain, physician assisted suicide remains an alternative.

The following quotation seems especially appropriate at this point:

> "Kevorkian's and Quill's desire for open debate, as well as that of the eight doctors who supported the role of physicians in assisting in rational suicide, is laudable. That collective social decisions are possible is evident in the Netherlands, where guidelines allow euthanasia under carefully regulated conditions. But if nothing more than legislated safeguards result from the debate in this country, we shall have failed in the goal of better meeting a patient's needs at death. For the discussion to proceed to the development of thoughtful and sensitive public policy, both the medical profession and legislators must be better able to distinguish between people whose suicidal intent is clearly conceived and free of distorting mental disturbances and people who are in need of psychiatric care. As the debate proceeds, we must avoid romanticizing suicide, regarding it simplistically, or allowing negative attitudes toward aging to influence its course. Furthermore, the public controversy over euthanasia, suicide, and the right to die should not be confused with the equally important debate about allocating limited health resources to terminally ill patients. Additional research and education of the medical

> profession and the public about the nature of affective disorders and suicide late in life will lead to a more informed discussion and possibly to lower suicide rates resulting from the earlier recognition and treatment of people at risk." *(Rational Suicide And The Right To Die*, New England Journal of Medicine, October 10, 1991 at page 1102)

This Court's opinion relies upon case law, but also includes mention of bio-ethics, philosophy and references to medical texts and proposed legislation. These are not normally found in a legal opinion. However, because the parties have argued such matters in their briefs, and because this is a case of first impression, the Court responded.[4]

We must not lose sight of the two most important and sorrowful people who had such a crucial role in this case: Sherry Miller, whose life had no quality and who was so totally dependent upon others, and Marjorie Wantz, who suffered her excruciating pain probably longer than any of us would have endured. It is these sad women, whether terminal or not, for whom we must have compassion.

These final comments are addressed to Dr. Jack Kevorkian: you have brought to the world's attention the need to give this topic paramount concern. This

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4 The Court has found the following sources helpful: *Michigan's Proposed Assisted Suicide Legislation: Strong Public Policy or Legislative Rhetoric?*, 69 U DET MERCY L REV 33 (1991); Molenda, *Active Euthanasia: Can It Be Justified?*, 24 TULSA L J 165 (1988); Kutner, *The Living Will Coping With The Historical Event of Death*, 27 BAYLOR L REV 39 (1975); Weir, *The Morality of Physician Assisted Suicide*, 20 LAW MED AND HEALTH CARE NO 1-2 (SPRING-SUMMER 1992); *The Physician's Responsibility Toward Hopelessly Ill Patients*, 320 NEW ENG J OF MED 844-849 (MARCH 30, 1989); *The Right of the Terminally Ill to Die, With Assistance if Necessary*, 8 CRIM JUST J 403 (1986).

Judge, however, respectfully requests that you forego any other activities in this field, including counseling, for the time being. To continue I fear hurts your cause, because you may force the Legislature to take hasty, and perhaps improvident, action. Give the Michigan Medical Society and the Michigan Bar Association more time to do right.

This case is dismissed. However, as this Opinion has limited precedential value, appeal is invited.

/s/ DAVID F. BRECK
CIRCUIT JUDGE

DATED: JULY 21, 1992

EXCERPTS OF COURT'S CHARGE TO THE JURY

(State of Michigan — Recorder's Court — City of Detroit)

(Proceedings of May 9, 1991)

(THE PEOPLE OF THE STATE OF MICHIGAN, Complainant, v BERTRAM ROBERT HARPER, Defendant — No. 90-10081)

Before the Honorable ISIDORE B. TORRES, Recorder's Court Judge, Detroit, Michigan, on Thursday, May 9, 1991.

APPEARANCES: TIMOTHY KENNY, Assistant Prosecuting Attorney, Appearing on behalf of the People; HUGH DAVIS, ESQ., and OTIS W. CULPEPPER, ESQ., Appearing on behalf of the Defendant.

* * *

(3) Detroit, Michigan
Thursday, May 9, 1991 — Afternoon Session

THE COURT: Ladies and gentlemen of the jury, I will now read to you the instruction on second degree murder.

The Defendant is charged with second degree murder. To prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the Defendant caused the death of the decedent, Mrs. Harper; that is, that Mrs. Harper died as a result of asphyxiation.

Second, that the Defendant had one of these three states of mind: He intended to kill, or he intended to do great bodily harm to Mrs. Harper, or he intentionally — I'm sorry — or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm was a likely result of his actions.

Ladies and gentlemen of the jury, I have just instructed you on the elements of second degree murder which must be found beyond a reasonable doubt for a conviction on this offense.

For this crime, I have instructed that one element (4) that you must find proven beyond a reasonable doubt is that the Defendant caused the death of Mrs. Harper; that is, that Mrs. Harper died as a result of asphyxiation by Defendant's fastening a bag over her head.

I will now read you the instructions on suicide and euthanasia.

I instruct you that a suicide is a death caused by one's own hands or actions. It is the intentional destruction of a person by himself or herself.

Put another way, it is to cause one's own death.

Suicide excludes by definition that the death of a deceased was caused by the sole and final acts of another person.

I instruct you that suicide is not a crime in the State of Michigan. In this case, the Defendant is charged with murder in the second degree. If you find that the Defendant, Robert Harper, only intended and only acted to

the level of preparing and assisting a suicide, then he is not guilty of murder.

It is for you to determine the Defendant's intent and actions at the time of the acts charged in the Information.

I instruct you also that an act of euthanasia is the act of putting to death a person suffering from incurable or distressing disease, an act of mercy, commonly (5) known as a mercy killing.

The prosecution is required to prove beyond a reasonable doubt that the Defendant caused the death of Mrs. Harper. But if you so find, then, whether his motives were good or ill, is not for your consideration.

I instruct you that an act of euthanasia is a homicide subject to the instructions on second degree murder that I have just given you.

You have heard testimony that Mr. Harper and/or Mrs. Harper believed that assisted suicide was legal in the State of Michigan.

If you believe that the evidence establishes beyond a reasonable doubt that Mr. Harper committed murder in the second degree, the Defendant cannot claim ignorance of the law or mistake of law as a defense.

A mistake about the state of the law regarding one's rights to take life will not excuse a homicide.

* * *

THE COURT: Ladies and gentlemen of the jury, I have received the following note from you. It states as follows:

> "We request a copy of the elements of second degree murder."

Ladies and gentlemen, I have the only copy. They have not been typed up for you. But what I will do is (6) simply to read it to you. Okay? This is now the instruction on second degree murder.

The Defendant is charged with the crime of second degree murder.

To prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the Defendant caused the death of Mrs. Harper; that is, that Mrs. Harper died as a result of asphyxiation.

Second, that the Defendant had one of these three states of mind: He intended to kill, or he intended to do great bodily harm to Mrs. Harper, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions.

That is the instructions on second degree murder.

* * *

(Certificate of Reporter Omitted)

FILED
MAR 27 1995

94-1490

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JACK KEVORKIAN,
PETITIONER

vs.

THE PEOPLE OF THE STATE OF MICHIGAN
RESPONDENT

ON CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

JOHN D. O'HAIR
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County of Wayne

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**Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

IS THERE IS A DUE PROCESS RIGHT TO COMMIT SUICIDE, ATTEMPT SUICIDE, OR ASSIST IN A SUICIDE, THOUGH THE CONSTITUTION HAS NOTHING TO SAY ABOUT THE SUBJECT?

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was charged with the criminal offense of assisting in a suicide under MCL 752.1027; MSA 28.547(127). After he was bound over for trial, the trial judge dismissed on motion, finding the statute unconstitutional as a violation of the rights of the petitioner to substantive due process under the United States Constitution. The Michigan Court of

Appeals affirmed the dismissal, but found dismissal mandated by a technical violation of the Michigan Constitution (the "title/object" clause) in the manner in which the statute was passed, rejecting the due process claim.

Subsequently, on December 13, 1994, the Michigan Supreme Court reversed the Michigan Court of Appeals, holding that there is neither a title-object difficulty under the Michigan Constitution with the manner in which the statute was passed, nor a due process right to assisted suicide. Petitioner now seeks certiorari from this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

Respondent will not equivocate with regard to the issue here presented; whether State Legislatures are precluded from prohibiting assisting in a suicide by something in the Constitution is an issue of major national jurisprudential significance. However, certiorari should be denied because the Michigan Supreme Court correctly decided the question; the State of Michigan would also note that there is a question regarding whether the Petitioner presents to this Court a final judgment for this Court's review.

A. The Final Judgment Question

There is no question that the legal question in this case has been finally decided by the Michigan Supreme Court: that court held that there is no due process right to assisted suicide, and this is the

law in Michigan, and applicable to this case. However, this ruling arose from a prosecution appeal from the dismissal of the criminal prosecution on defense motion, and no trial has yet been held. It is clear that should the petitioner be convicted, the Michigan Supreme Court ruling is the law of the case on any subsequent appeal, and the issue would be resolved the same way on that basis. However, that there is a trial remaining does raise a question as to whether a final judgment is presented under 28 USC 1257.

The statute confers jurisdiction with respect to "final judgments...rendered by the highest court of a State in which a decision could be had." This Court stated in Department of Banking v Pink, 317 US 264 (1942) that the test is whether the record shows that "the order of the appellate court has in fact fully

adjudicated rights and that the adjudication is not subject to further review by a state court." Here, the legal question has been fully adjudicated, but further proceedings remain in the state court system on the case. This Court must decide as a threshold matter whether the judgment is final for purposes of 28 USC 1257.

On the other hand, this court has given the finality requirement a "practical rather than a technical construction." Cohen v Beneficial Loan, 337 US 541, 546 (1949). There are situations where a practical construction of the statute has led the Court to consider a ruling final even though there are further proceedings in the lower court yet to be undertaken. Cox Broadcasting v Cohn, 420 US 469 (1975). The category of case under Cox within which the instant case might fall is that it might be viewed as a case "where the federal issue

has been finally decided in the state courts with further proceedings pending in which the party seeking review...might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." Here, the case might be decided on nonfederal grounds (petitioner might be acquitted at trial), where reversal of the Michigan Supreme Court on the due process issue presented by petitioner would in fact be "preclusive of any further litigation" by causing dismissal of the prosecution, if there is a due process right to suicide. It thus may well be that this case falls within

Cox, but respondent believes it appropriate to call the question to the Court's attention.

B. The Question On The Merits

(1) The Framework of Review

The question regarding which Petitioner seeks review is whether the Michigan Supreme Court properly held that whether assisting in a suicide is to be prohibited is a question for the political branches of government. Respondent submits that it did.

The starting point for all analysis of the constitutionality of a statute is that the constitutionality of the law in question "is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the constitution upon their action, have adjudged that it is so." Thomas Cooley,

Constitutional Limitations, at 183. See also People v Collins, 3 Mich 343, 349, 405 (1854); People v Gansley, 191 Mich 347 (1917) ("courts in a long series of cases have enunciated the principle that the presumption is in favor of the constitutionality of a statute"). This may seem a commonplace, but, as Justice Cooley observed elsewhere in his treatise regarding another maxim of construction, while it may "seem so obvious a truism that one expects to see it universally accepted without question" nonetheless it "frequently becomes necessary to re-declare this fundamental maxim." Cooley, at 59.

Because of this presumption of constitutionality, and also because resolution of a challenge to the constitutionality of a statute is "one of the most grave and delicate duties which a judicial tribunal can be called upon to

perform," Collins, at 347, Cooley, at 182, Justice Cooley wrote that "when courts are called upon to pronounce the invalidity of an act of legislation...they will approach the question with great caution...and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond a reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.....'It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt.'" Cooley, at 182-183, quoting Ogden v Saunders, 12 Wheat 270 (1827). See People v Stambosva, 210 Mich 436, 441 (1920) (the rule is that "every intendment is to be taken in favor of the

propriety and validity of legislative action, and that in case of doubt courts should not interfere to thwart the legislative will").

Of course, it is also a truism that a court may not invalidate a statute because the court believes it "unjust and oppressive," or because "it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed by the constitution." Cooley, at 164. This is so because in exercising the authority to declare a statute unconstitutional judges are not claiming judicial supremacy; rather, "they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the

constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." Cooley, at 160 (emphasis added).

In examining the constitutionality of a statute, the meaning of the constitutional provision against which the statute is to be measured is obviously of critical importance. The foremost maxim of construction is that "The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." Cooley, at 55 (emphasis in the original). This method of construction is a part of our jurisprudential history. The court is to "declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it

is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Cooley, at 55. As Justice Campbell put it in People v Blodgett, 13 Mich 127, 138 (1865): "The meaning of our constitution was fixed when it was adopted, and the question which is now before us is not different from what it would have been had the constitution been recently adopted....Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them." See also Justice Scalia, concurring in Minnesota v Dickerson, 124 L Ed 2d 334, at 348 (1993): it is a "fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning

ascribed to them at the time of their ratification." This does not mean that the constitution is "static" in that it cannot be applied to unforeseen events or developments--surely, its principles can be applied to new situations, as Justice Campbell recognized over 125 years ago: "That the constitution means nothing now that it did not mean when it was adopted, Iregard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances." Blodgett, at 140 (emphasis added). But the principles do not change--the constitution does not change to meet the times--the constitution is simply capable of application to new circumstances.

(2) The Due Process Question

> "...there is simply no avoiding the fact that the word which follows "due" is "process"....we apparently need periodic reminding that 'substantive due process' is a contradiction in

terms--sort of like 'green pastel redness.'"[1]

John Hart Ely, Democracy and Distrust (Harvard University Press, 1980), p.18.

The opinion of the trial judge in this case, ultimately reversed by the Michigan Supreme Court, starkly reveals the dangers of adjudication by preferring a particular moral philosophy. The trial judge, in inventing a due process right to assisted suicide, rejected the notion that the history and tradition of the Nation provide the standard, for, said the trial judge, that would "not permit (the constitution" to be (a) living (and) dynamic document...." (that is, would not allow it to be amended

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[1] See also Justice Scalia, concurring in United States v Carlton, __US__, __LEd 2d __, __S Ct__ (62 LW 4472, 4476 (6-13-94): "If I thought that that "substantive due process" were a constitutional right rather than an oxymoron...."

other than by actually being amended), the court relying heavily on the case of Planned Parenthood v Casey, 505 US___, 120 L Ed 2d 674 (1992), citing the "joint opinion" of three justices. The court found instead that history and tradition "has its uses," but that there is a second and separate (though related) component to the due process inquiry, and that is to consider whether the claimed right is "implicit in the concept of ordered liberty.". The concept of "ordered liberty," held the court, is by definition an inquiry into the "contemporary collective conscience." Thus, the court viewed the constitutional inquiry as an examination of history and tradition, coupled with an examination of the "contemporary collective conscience," which it substituted for the concept of "ordered liberty."

The trial judge not only translated "ordered liberty" into "collective contemporary community conscience," a translation which cannot be defended, but also transmorgified the analysis of our Nation's history and tradition into an analysis of the "moral or legal history and tradition" not only of this Nation, but of "western society" in general. Finding no support in the history and tradition of this Nation for assisted suicide, the trial judged turned to "Greek and Roman" practices as providing "significant support" that historical attitudes toward suicide in those societies were more "generous" than those found in our history. The court thus spent some time discussing Greek and Roman practices, as well as alleged early Christian practices, none of which has the slightest thing to do with what "liberty" was understood to mean in the history and

tradition of our Nation at the time of the ratification of the Constitution of the United States, and at the time of the ratification of the 14th Amendment, a history and tradition which is, in fact, quite clear.

The court then reached a truly remarkable conclusion: after finding that this country has a strong tradition and history against suicide, but that Greek and Roman history were more generous, the court concluded that "The foregoing review of our Country's history and tradition does not reflect an equivocal result, but one that is murky." This is completely untrue--the history of our Nation, even as expounded by the trial judge, is absolutely clear; it cannot be made "murky" by looking to the history and tradition of other nations! To say, as did the trial judge, that "there is significant support in our traditions and

history for the view approving suicide" (emphasis added) is simply flatly false; to say, as did the trial judge, that "it may be that the view which proscribes suicide or attempted suicide currently predominates" is to say that even under the trial judge's "contemporary community conscience" standard (which cannot be found in the Constitution) the statute must be constitutional. The Michigan Supreme Court properly rejected this form of "jurisprudence."

The Analytical Approach

> "Well, what may seem like the truth to you," said the seventeen-year-old bus driver and part-time philosopher, "may not, of course, seem like the truth to the other fella, you know."
>
> **"THEN THE OTHER FELLOW IS WRONG, IDIOT!"**
>
> Philip Roth, The Great American Novel (1973), p.19.
>
> "...it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon

> conceptions of morality with which they disagree....Otherwise a constitution...would be become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus.
>
> Otis v Parker, 187 US 606, 47 L Ed 326 (1902) (Justice Holmes, for the Court)

The attack on the prohibition on assisted suicide generally proceeds by a series of logical progressions, essentially as follows: 1)the Constitution prohibits deprivation by the Government of an individual's life, liberty, or property without Due Process of law; 2)a concept of "personal autonomy" may be located within the "liberty" protected by the Constitution; 3)that concept of personal autonomy includes a person's ability to control his or her own body--to make "basic decisions regarding bodily integrity"; 4)that ability to control one's own body and make basic decisions regarding bodily integrity includes the

liberty to terminate one's life; 4) a prohibition on the liberty interest of self-destruction is therefore unconstitutional (rather than subject to deprivation only upon "Due Process"). It is more than passing strange that under the Due Process Clause one's very life may be taken by the Government, certainly against his or her will, so long as fair procedures are employed, but an alleged aspect of one's right to liberty may not, no matter what the procedure. How can this be? From where does this liberty interest arise that is superior to one's right to live?

One thing is clear: an "undeprivable even with Due Process" right to liberty/personal autonomy/control of one's body/to commit suicide (and to assist someone in so doing) can be found neither in the text of the Constitution, nor in the history of our Nation. It comes, rather

from the belief of those who think it the right, or correct, or moral thing, and must be "constitutionalized" by them to protect it against those to whom it "may not, of course, seem like the truth," because those people, even if they happen to include the democratically elected lawmakers of the society, are simply **wrong**.

This approach, of course, allowed Chief Justice Taney to declare that there could be no valid law against slaveholding in the United States, slaveholders having a liberty (as well as property) interest in owning slaves with which the Government could not interfere. How did Chief Justice Taney know this liberty interest existed, it not being stated in the Constitution? He knew it because he was passionately convinced that it **must** be so. Dred Scott was not decided on the basis of history and tradition giving rise to a liberty interest in slave holding,

as history and tradition would not support such a finding, slavery being prohibited in much of the country. It was the prevention of action by the democratically elected legislature--a ursupation of authority by the judiciary--by proclaiming that the legislature was without power to ban slavery in the territories through the finding of a liberty interest in the slave holder which helped precipitate the Civil War. Dred Scott was decided on Petitioner's theory of constitutional adjudication; that is, that the Constitution is an empty vessel into which the judiciary may pour whatever meaning it chooses, the object of the parties to constitutional disputes being to convince the court as to which side has the better moral philosophy.

Petitioner offers no principle by which the statute could be overturned which would in any way serve as a check on the personal

predilections of the judiciary. In short, the approach of the petitioner is simply moral philosophy, attempting to engraft a particular moral philosophy into the Constitution, and as Professor Ely has said, "our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives." Because history and tradition demonstrate that there is no constitutional right to assisted suicide does not <u>disable</u> the legislature from deciding to <u>allow</u> the practice. It is a finding of <u>unconstitutionality</u> which freezes tradition and history, which ends debate on the matter, not a finding of constitutionality, which allows the democratic process to continue to work.

The Constitution not properly being a flag to be captured by whomever can persuade a majority of Justices as to their view of moral philosophy, thereby completely shutting out competing views, what approach is to be taken as a matter of law and not philosophy to identification of liberty interests? Palko v Connecticut, 302 US 319, 82 L Ed 288 (1937) demonstrates the method.

Today, the doctrine of "selective incorporation" of the Bill of Rights has captured the field as to most of the rights protected by the Bill of Rights, so that it is held that the "Due Process" required by the 14th Amendment of the States includes most of the Bill of Rights. But before selective incorporation there was Palko, and the approach of Palko is still valid with regard to claims of liberty interests or procedural protections not contained within

the Bill of Rights. In that case the defendant was found guilty of murder in the second degree after a trial for first degree murder, and the state appealed, as was allowed under Connecticut law. On appeal it was found that error had been committed in excluding the defendant's confession, in excluding testimony to impeach his credibility, and in instructing the jury on the difference between first and second degree murder. Palko was retried, convicted of first degree murder, and sentenced to death. He claimed that jeopardy precluded the retrial which he had not sought.

Because the Bill of Rights, and therefore the jeopardy provision, was not (then) applicable to the States, the Court looked to the Due Process Clause of the 14th Amendment to see if the practice of Government appeal and retrial offended that clause. The Court stated that those

protections which may be found to be "implicit in the concept of ordered liberty" are applicable to the States through Due Process requirements. A liberty interest or procedural protection exists if "so rooted in the traditions and conscience of our people as to be ranked fundamental." In the case before it the Court concluded that because the state was not "attempting to wear the accused out by a multitude of cases with accumulated trials," but instead asking only that "the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error," this was not "cruelty at all"; indeed, to allow the state an appeal with regard to trial error was, said the court, "no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than before." 82 L Ed at 293-294.

As stated, the total incorporation/selective incorporation/no incorporation struggle with regard to the Bill of Rights has ended with the victory of selective incorporation, but for claims outside the Bill of Rights the Palko approach remains viable. Michael H. v Gerald D., 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333 (1989) illustrates the point. The petitioner maintained an adulterous relationship with a married woman who was cohabiting with her husband, and a child was born, which was almost certainly his. The mother reconciled to her husband, and state law conclusively presumed that the issue of a wife cohabiting with her husband, who was not impotent or sterile, was the child of the marriage. The purpose of the statute was to protect the privacy and integrity of the family; the petitioner, however, wished to establish visitation rights with the

child, which he could only do by establishing paternity, which the law precluded. He claimed that the state statute was unconstitutional because he had a liberty interest in his relationship with his child.

The Court rejected the claim. The plurality opinion observed that the Court itself had previously expressed concern regarding the recognition of "new" liberty interests under Due Process claims, "lest the only limits to...judicial intervention become the predilections of those who happen at the time to be Members of this Court." Moore v East Cleveland, 431 US 494, 52 L Ed 2d 531, 97 S Ct 1932 (1977). As Justice White observed in dissent in Moore, "the present construction of the Due Process clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers..., the Court should be

extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority."

The approach cannot be one of personal predilection then, said the Court, so that "we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental'...but also that it be **an interest traditionally protected by our society**," that it be "rooted in history and tradition." (emphasis supplied, 105 L Ed 2d at 105). Finding that the relation between persons in the situation of the petitioner and his child had not been protected under our historic practices (indeed, the historic tradition is the other way, to protect the

integrity and privacy of the family), th
Court rejected the claimed liberty interest
See also Bowers v Hardwick, 478 US 186, 92
Ed 2d 140, 106 S Ct 2841 (1986).

Moore v East Cleveland, cited above
itself also demonstrates the appropriat
method. A housing ordinance limite
occupancy of dwellings to members of
single family, and defined "family" a
essentially only the "nuclear" family.
woman was convicted of violating th
ordinance because she lived with her son an
two grandsons, and the grandsons were no
brothers but cousins. In dissent from th
finding of unconstitutionality of th
ordinance, Justice White expressed th
concerns above noted regarding judicia
usurpation of legislative authority unde
the auspices of the Due Process Clause
based on nothing other than th
predilections of the Justices. Justic

Powell, the author of the lead opinion, also appreciated this concern, agreeing that "there <u>are</u> risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights....there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court....history counsels caution and restraint." How, then, to avoid decisions based only on a particular moral philosophy embraced by a majority of Justices? Justice Powell supplied the answer: "Appropriate limits on substantive due process come...from careful 'respect for the teachings of history (and) solid respect for the basic values that underlie our society.'" 52 L Ed 2d at 540. Addressing Justice White's dissent directly, Justice

Powell stated that defining the substantive content of liberty interests to be found in the Due Process Clause by looking to "history and tradition" imposes "meaningful limits" on the judiciary. 52 L Ed 2d at 540, fn 12 (emphasis added). While reasonable people may at times disagree as to what history and tradition demonstrate, at least they are engaged in the same enterprise, and where history and tradition point in a certain direction, judges are not free to disregard it in favor of their own views of moral philosophy or ethical values.

Cruzan v Director, Missouri Department of Health,, 497 US 261, 111 L Ed 2d 224, 110 S Ct 2841 (1990) in no way justifies the trial court's usurpation of legislative authority; indeed, read properly, it virtually compels the opposite conclusion. The claimed liberty interest there was a right to refuse life-sustaining

medical intervention, and more precisely, whether the decision of the State that it must be demonstrated by convincing evidence that the individual who is being treated would desire the cessation of treatment was constitutional. The Court looked again to history and tradition. It is in our tradition that the touching of another person, including through medical treatment, without permission, or "informed consent," is a battery, which can lead to damages. As the Court observed, the "logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." 111 L Ed 2d at 236. The Court specifically declined to view the matter as involving a generalized constitutional right of privacy, analyzing the question instead in terms of a liberty interest to avoid unwanted touching or intervention upon one's

body, and looking to history and tradition. The Court concluded in the end that this liberty interest can be regulated by the State with process that is "due," and held that requiring a showing of convincing evidence was not improper, or "undue." On its way to this conclusion the Court discussed the State's interest in the matter, noting in support of the State's interest that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." 111 L Ed 2d at 243. How possibly could the Court have looked to the fact that the majority of states have laws imposing criminal penalties for assisted suicide as a factor in favor of the State's interest on the issue of terminating medical care if those state laws are in fact unconstitutional? Cruzan provides no support for the trial court's unheard of

procedure, but mandates the conclusion that the trial court erred egregiously, and supports the opinion of the Court of Appeals.

The Casey Decision

Petitioner relies most heavily on the triune joint opinion in Planned Parenthood v Casey, 120 L Ed 2d 674 (1992). The decision, however, plays them false. Casey, albeit in a way previously unknown in jurisprudence, "retained" the "essential holding of Roe v Wade...." (retained in a way previously unknown in jurisprudence in that the joint opinion also modified the "essential" holding of Roe v Wade, see Justice Scalia, dissenting, at 120 L Ed 2d at 791: "I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version" of stare decisis). The opinion threw out the trimester approach of Roe in

favor of a viability approach; that is, it held that the State may absolutely prohibit abortions, save when necessary to save the life or health of the mother, after fetal viability. Thus, once the fetus has attained the degree of development that the Court is willing to recognize as "life," the interest of the State in protecting life outweighs the interest of personal autonomy, so that the State may prevent the abortion. See 120 L Ed 2d at 710. Even before viability, the State's "profound interest" in what the opinion called "potential life" allows regulation, so long as an undue burden is not placed on the decision to obtain an abortion, an "undue burden" being a provision of law the purpose of effect of which is to place a "substantial obstacle" in the path of a woman seeking an abortion "before the fetus attains viability." 120 L Ed 2d at 715. At viability, however, the

State's interest overtakes the individual liberty interest created in Roe, and nontherapeutic abortions may be prohibited.

This does not advance the petitioner's cause, for even abortion law, then, recognizes an overwhelming State interest in protecting life that has reached that form which the Court is willing to recognize, which, in the case of a fetus, is viability, that state of development where the fetus could survive outside the womb. If the State's "profound interest" in protecting life overtakes the right of liberty created in Roe, how can it possibly be said that it ends at some point after birth? The interest of the State is surely at least as profound after birth as at viability, as history teaches. The only possible answer of the petitioner is that life may reach a point where it should not be considered life--it should be defined "out of"

life--for it has become "not worth living." But this question of moral philosophy is one to be debated before legislatures, not one for the imposition of a particular answer by judges, and history teaches that the concept of a life not worthy to be lived is a dangerous notion indeed. Casey supplies no succor to petitioner:

Tradition and Assisted Suicide

Do, then, our traditions and our history recognize a right to suicide, and to assist another in its commission (leaving aside whatever the history and traditions of other nations, such as Greece and Rome, reveal)? Clearly not. In England, suicide was a form of common law murder, described as either self-murder, see 3 Coke, Institutes Of The Laws of England 54 (1797), 4 Blackstone, Commentaries 189, or the decedent being deemed "the murderer of himself." W Clark and W Marshall, A

Treatise On The Law of Crimes, sec. 10.03, at 623 (7th Ed, 1967). It was punishable by burial in the highway with a stake through the suicide's body and forfeiture of all his goods to the crown. According to Blackstone, common law felonious homicide occurred "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." Blackstone specifically stated that murder may be "either by killing one's self, or another man." 4 Blackstone, Commentaries, 188, 195.

Suicide is no longer considered criminal, but not because the act does not fall within the definition of murder, but because no punishment is provided for self-murder. Forfeiture of all property and burial in the highway with a stake through the suicide's body is no longer considered

appropriate. This change was accomplished not to legitimize the act of suicide, but to spare the family of the suicide. See e.g. Kamisar, "Are Laws Against Assisted Suicide Unconstitutional," Hastings Center Report 23, no. 3, p.32 (1993). However, aiding a suicide still falls within the common law definition of murder, and, where there is no other specific offense for the crime of assisted suicide, is therefore punishable according to the ordinary statutory penalties. The position of the dissent, that because "neither suicide nor attempted suicide is a crime in this state or in any other state..." that it is therefore "logically incomprehensible that a person can be charged with a capital crime of aiding and abetting a lawful act," 205 Mich App at 192, not only simply ignores binding precedent (Roberts), but may well have been expressed nowhere else in a judicial

opinion, as Professor LaFave has derided the view that because suicide is no longer punished assisted suicide is also not criminal (the view taken by the dissent in this case) as "**most certainly unsound**." 2 LaFave and Scott, Substantive Criminal Law, sec. 7.8(c), at 249 (1986). The most celebrated model code with regard to criminal law, the Model Penal Code, not only prohibits assisted suicide in sec. 210.5, but grants a privilege to those who use force to prevent a suicide. See sec. 3.07(5). The Code was drafted after years of study, by the most eminent criminal law scholars, and itself is proof that there has not existed a historically recognized right to commit suicide or to assist in a suicide. See Kamisar, at 33.

Moreover, at the time of the ratification of 14th Amendment 21 of the 37 existing states, and 18 of the 30 ratifying

states, prohibited assisted suicide. And even those states which had not spoken to the issue in 1868 held that assisted suicide was unlawful when the issue was faced. See Marzen, O'Dowd, Crone, and Balch, "Suicide: A Constitutional Right?," 24 Duquesne L Rev 1, 76-100, 148-242 (1985). It can readily be said that there is no significant support whatever for any claim that a right to suicide, or to assist in suicide, is "so rooted in our tradition that it may be deemed fundamental or implicit in the concept of ordered liberty."

There is not in this country, then, a tradition protecting suicide or assisted suicide. The Michigan Supreme Court properly left the question to the Michigan Legislature. Petitioner's view would arrogate the authority of "We the People" unto the judiciary, to make decisions the

judiciary is singularly unqualified to make.[2] The Michigan Supreme Court rightly recognized this.

(3) Conclusion

> "It is precisely historical practices that define what is 'due.' 'Fundamental fairness' analysis may appropriately be applied to departures from traditional American conceptions of due process; **but when judges test their individual notions of 'fairness' against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges."**

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[2] See Alexander Bickel, The Supreme Court and The Idea Of Progress (Yale University Press: 1978), p. 84: "The independence of the judges is an absolute requirement if individual justice is to be done....But supreme judicial autonomy, the judge answerable only to his own conscience in making policy for the society, in adjusting, conformably to one or another choice of values, the conflicting interests, desires, and ethical and moral aspirations and preferences of the groups that constitute the society--that is something else again...."

Justice Scalia, concurring in Schad v Arizona, 115 L Ed 2d 555 (1991)

The claim that assisted suicide is protected by the Due Process Clause fails as a matter of history and tradition, and fails in its attempt to broadly state the right as a right of "personal autonomy," which does not exist. There are particular rights of personal autonomy, such as the right not to be seized under the Fourth Amendment absent probable cause or reasonable suspicion, but a general right to personal autonomy is a right to be free of all law. The line-drawing Petitioner would require here is classic judicial legislation. If there is a right of personal autonomy which includes a right to self-destruction, how can it possibly be limited? Why would not a person simply tired of life have a right to "blow his brains out" or drown him or herself without interference by the state?

And if there is a right of personal autonomy, which includes the right to control one's own body and make basic decisions regarding bodily integrity, why does it not include a right of consenting adults to engage in acts of incest? Why does it not include the right of a competent minor to engage in sex with an adult (how can statutory rape exist as a crime where the act is consensual?). Why does it not include the right to polygamous marriages? Why does it not include the right to take psychotropic drugs for recreational purposes? Why can an individual who causes harm to him or herself be committed to an institution as a threat to him or herself?

The "right" which the Petitioner would have the judiciary invent is rife with line-drawing impossibilities. Could it possibly be plainer that if "in matters that relate solely to ourselves, we alone are

free to decide our personal fate," as stated by the dissenting judge in the Michigan Court of Appeals, then a right to suicide must include all of "us"--it cannot be said that it does not extend to those that are suffering physical pain but are not terminally ill, that it does not extend to those that are suffering "psychic" pain but are not physically ill at all, that it does not extend to anyone for any reason whatsoever. Further, any attempt at linedrawing necessarily involves the government in determining whether a life is "worthy to be lived." If the right is invented and limited to the terminally ill, when does it come into being? We are terminal from the moment of conception; when a specific illness has overtaken us, so that our death is reasonably predictable, does the "right" exist 3 months from death, 6 months from death, one year from death, five

years from death? Does it not exist for those who are terminally ill, but who are not suffering great pain, and who determines whether pain is being suffering, and its degree? If the "right" belongs only to the terminally ill who are suffering, but whatever standard, how can it be denied to those who are suffering "psychic" pain. How can a court possibly arrogate to itself the right to tell these people that though "The power to determine the limits to which one can endure pain and agony is certainly intrinsic to this basic concept of personal autonomy," it does not belong to <u>them</u>, so that rather than being treated (as many are, to full recovery) they should simply be assisted in achieving their deaths. As Professor Kamisar has observed, "if a competent person comes to the unhappy conclusion that his existence is unbearable and freely, clearly, and repeatedly requests

assisted suicide, why should he be rebuffed because he does not 'qualify' under somebody else's standards? Isn't <u>this</u> an arbitrary limitation of self-determination and personal autonomy? 'How,' asks Daniel Callahan, 'can self-determination have any limits? Why are not the person's desires or motives, whatever they be, sufficient?'" Kamisar, at 37. The People have simply not spoken on this question through the Constitution, and thus it is for the legislature.

Moreover the concern, expressed by Professor Kamisar, that "In a climate in which suicide is the 'rational' thing to do, or at least a 'reasonable' option," that it will "become the unreasonable thing <u>not</u> to do? The noble thing <u>to</u> do?....how likely is it that an old or ill person will be encouraged to spare both herself and her family the agony of a slow decline, even

though she would not have considered suicide on her own?" is certainly legitimate, and may be considered by even "medieval" legislators and scholars, as petitioner has called them, among other epithets. In this vein, Respondent would point out that time and again the enactment of the statute here at issue, and its enforcement by prosecutors, has been compared by petitioner to "Germany in the 1930's and 1940's," it being said that officials there and then also said they were "just following the law." This is bad logic, bad law, and bad history. Atrocities occurred in Germany not because people "followed the law," but because the law broke down; the nation of Germany was ruled by the cult of personality, by one who thought his notions of moral philosophy superior to all others, and who had the military power to put his philosophy into action. Those who committed

atrocities in his name did not "follow the law," they followed orders. It was the suppression of democracy in favor of a "power elite" which was, in its view, above the law, which led to the Holocaust.

An article published in 1949 is also instructive in this regard. The article is "Medical Science Under Dictatorship," 241 New England Journal of Medicine 40 (1949). The article examines the question of how respected men of science--physicians--could have engaged in atrocities under Nazi rule. The article, being published in 1949, has nothing to do with assisted suicide, not being written by a "partisan" of one side or the other of this question of moral philosophy and policy, but being concerned with physician atrocities during the War. The author concluded:

> Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings.

> The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthenasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the nonrehabilitable sick.

241 N Eng Jrnl of Med at 44 (emphasis added).

As stated earlier, Justice Cooley long ago correctly observed that in exercising the authority to declare a statute unconstitutional judges are "only the administrators of the public will. If an act of the legislature is held void, it is

not because judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." Cooley, at 160 (emphasis added). History clearly teaches us that the people have not expressed their will in the constitution that assisted suicide be protected, and there is thus nothing in the constitution which is paramount to the decision of the people's elected representatives, in our constitutional democracy, to continue to prohibit it.

The "right" sought to be pounded into the Constitution by the petitioner simply cannot be found there, but is one which must be sought in the political arena, there being no principled basis upon which to locate it in the Due Process Clause. It can

only be found there when judges assert their personal and individual predilections as being law. To conclude by reiterating Professor Ely: "...reasoning about ethical issues is not the same as discovering absolute ethical truth...our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives." The opinion of the Michigan Supreme Court is correct.

CONCLUSION

Wherefore, the People respectfully request that the certiorari be denied.

Respectfully submitted,

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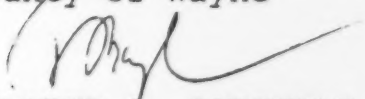

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